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LEI MENG v. INSPEKTOR WAYANDIANA ABDULLAH & ORS AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
MOHD ZAWAWI SALLEH FCJ
B NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NOS: 05(HC)-38-03-2021(W),
05(HC)-41-03-2021(W), 05(HC)-43-03-2021(W),
05(HC)-42-03-2021(W), 05(HC)-44-03-2021(W),
05(HC)-45-03-2021(W), 05(HC)-106-06-2021(W),
C 05(HC)-107-06-2021(W), 05(HC)-108-06-2021(W),
05(HC)-109-06-2021(W), 05(HC)-110-06-2021(W),
05(HC)-111-06-2021(W), 05(HC)-112-06-2021(W),
05(HC)-113-06-2021(W), 05(HC)-114-06-2021(W),
05(HC)-115-06-2021(W), 05(HC)-116-06-2021(W),
D 05(HC)-117-06-2021(W), 05(HC)-118-06-2021(W),
05(HC)-119-06-2021(W), 05(HC)-120-06-2021(W),
05(HC)-121-06-2021(W), 05(HC)-122-06-2021(W),
05(HC)-123-06-2021(W) & 05(HC)-124-06-2021(W)]
14 FEBRUARY 2022

E

Abstract – *The detention of foreign nationals under the Prevention of Crime Act 1959 (POCA) in relation to 'the organization and implementation of online gambling' herein was fundamentally flawed and illegal. Although POCA and its entire scheme applies to both*
F *citizens and non-citizens, online gambling simpliciter, for lacking the factual basis of organised crime as envisaged in art. 149(1)(a) of the FC, does not fall within the purview of POCA. This said, habeas corpus applications should always be looked at from the date of the filing of the applications; and the fact that a detenu, subsequent to his application*
G *for release, has again been preventively detained by some other authority, or under some other provision, legislation or order, does not vitiate his right to judicial scrutiny over the legality of his initial detention.*

CRIMINAL PROCEDURE: *Habeas corpus – Appeal against – Legality of*
H *detention – Detenus nationals of People's Republic of China – Detention in relation to 'the organization and implementation of online gambling' under Prevention of Crime Act 1959 – Detentions have since expired although detenus detained during disposal of appeals before High Court – Whether appeals before Federal Court academic – Whether applications for habeas corpus could only be directed at*
I *presently subsisting order of detention – Whether detenus' right to judicial scrutiny over legality of detention vitiated – Whether there was live issue for Federal Court's determination – Whether High Court ought to have ordered habeas corpus*

CRIMINAL PROCEDURE: *Preventive detention – Detention under Prevention of Crime Act 1959 ('POCA') – Detenus detained in relation to 'the organization and implementation of online gambling' – Whether online gambling simpliciter fell within scope of POCA*

CRIMINAL PROCEDURE: *Preventive detention – Detention under Prevention of Crime Act 1959 ('POCA') – Detenus, nationals of People's Republic of China, detained in relation to 'the organization and implementation of online gambling' – Whether POCA applied to non-nationals or foreign nationals – Whether POCA restricted to only Malaysian citizens – Federal Constitution, arts. 8(1), 149 & 151(1)(a)*

There were two sets of appeals originating from applications for *habeas corpus* heard before two different High Court Judges ('HCJ'). The appellants were nationals of the People's Republic of China who were detained in relation to 'the organization and implementation of online gambling' under the Prevention of Crime Act 1959 ('POCA'). The first set of appeals dealt with six applications ('first set of applications') while the second set dealt with 19 applications ('second set of applications'). The periods of detention have since expired although all the appellants were in detention at the time of the disposal of their appeals before the High Court. At the High Court, the appellants in (i) the first set of applications sought declarations that their arrest, remand and detention, under ss. 3, 4 and/or any of the statutory provisions of the POCA were illegal on the ground that such arrest and detention were *ultra vires* the POCA; and (ii) the second set of applications challenged the legality of their detention under the provisions of the POCA, pursuant to art. 5(2) of the Federal Constitution ('FC'). The primary basis for the challenge in both sets was identical, namely that online gambling did not fall within the purview of the POCA and that the POCA did not apply to foreign nationals. The first set of applications was dismissed on the ground that they were academic. Notwithstanding this, the HCJ held that the POCA applied to foreign nationals and not only to Malaysian citizens. The second set of applications was similarly dismissed but, since the appellants were in detention then, the issue of the applications being academic did not arise. In these appeals, the issues that arose for determination were: (i) whether the appeals, as a whole, were academic; (ii) whether online gambling *simpliciter* fell within the scope of the POCA; and (iii) whether the POCA applied to non-nationals or foreign nationals or was restricted to Malaysian citizens.

Held (allowing appeals)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The High Court's constitutional duty to assess the legality of any detention – especially preventive detention – started from the date of filing of the *habeas corpus* application. The jurisdiction of the High Court or a High Court Judge was not determined by the fact of physical

detention but the legality of the detention itself. Viewed in this way and giving art. 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained did not vitiate his right to judicial scrutiny over the legality of his initial detention. Similarly, the fact that the detenu was released after the date the application was filed, but before the return or hearing date, did not affect the jurisdiction of the court to review the legality of the detention being challenged. The fact that the detenu was under detention during the hearing but released after an appeal to the Federal Court was filed, did not render the application 'academic'. In relation to the first set of applications, the fact that the detention was one under s. 19A of the POCA, rather than s. 4(1)(a) of the POCA, did not render the applications academic as, at the date of the filing of the applications, the appellants were indeed detained under s. 4(1)(a) of the POCA. Moreover, the applications specifically sought release from detention under the provisions of ss. 3, 4 and any other provisions of the POCA. That, in itself, warranted the court inquiring into the matter in view of its mandatory constitutional duty of review under art. 5(2) of the FC. The HCJ erred in law in failing to undertake the review and in holding that it was academic. With respect to the second set of applications, the fact that they were now free from detention under the POCA in no way precluded them from challenging the decision of the High Court on the issue. (paras 135, 137 & 138)

(2) The minority decision by Tengku Maimun Tuan Mat CJ, in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors* ('*Zaidi Kanapiah*'), reflected the correct approach to be adopted when determining whether online gambling *simpliciter* fell within the purview of para. 5 of Part I of the First Schedule to the POCA. Online gambling *simpliciter* did not fall within the purview or ambit of the POCA as there was no nexus between the online gambling and organised violence as envisaged under the POCA. Online gambling and organised violence were two separate and disparate matters. It was insufficient to warrant an inference that where there is online gambling *simpliciter*, there must follow, as a matter of course, organised violence. It was only where both elements subsisted, *ie* 'gambling online' and 'organised violence' that the matter fell for qualification under the POCA. The fact that some or many illegal gaming may result in violence, did not warrant the conclusion, that online gambling *simpliciter* must include organised violence *per se*. Therefore, the court was constrained to depart from the majority decision in *Zaidi Kanapiah* relating to whether online gambling *simpliciter* fell within the purview of the POCA. Online gambling *simpliciter* did not fall within the purview of para. 5, Part I, First Schedule of the POCA. (paras 174-180)

(3) The use of the words 'person' in art. 151(1)(a) of the FC and 'citizen' in art. 151(1)(b) of the FC was deliberate. Article 8(1) of the FC was not contravened. The classification between citizens and non-citizens was a reasonable classification as the differential between them was distinct, discernible and rational. The purpose of art. 151(1)(a) of the FC was to accord with the fundamental principles of natural justice by ensuring that any person, citizen or non-citizen, detained under legislation promulgated under art. 149 of the FC, was informed of the grounds for his detention and accorded an opportunity to make representations in respect of such detention. In view of the intelligible differentia between citizens and non-citizens or non-nationals, more particularly in the context of the singular nature of art. 149 of the FC which dealt with the special powers afforded to Parliament in relation to national security and emergency, the lack of provision of this further safeguard in art. 151(1)(b) FC did not offend art. 8(1) of the FC. This was particularly so as the fundamentals of natural justice were accorded due recognition and effect in art. 151(1)(a) of the FC. A reading of the POCA itself disclosed that there was nothing in the POCA which discriminated against citizens and non-citizens as reference was made to 'person'. Notwithstanding the lack of such a mandatory requirement under art. 151(1)(b) of the FC, all the appellants were afforded the opportunity to appear before the Advisory Board constituted under the POCA and put forth their representations. As such, they were not deprived of the added safeguard afforded under art. 151(1)(b) of the FC. This too detracted against any possible contravention of art. 8(1) of the FC in these appeals. (paras 185, 188 & 195-197)

(4) Article 149(1) of the FC envisages the promulgation of legislation, including preventive detention legislation, where a substantial body of 'persons whether inside or outside the Federation' cause or threaten subversion, organised violence or crimes prejudicial to the public as well as in the event of an emergency. In promulgating such legislation therefore, Parliament was not constrained to restrict itself to citizens. It was open to Parliament to legislate against 'persons' in general, which included non-nationals or non-citizens, where they were involved in such acts which constituted a grave threat to national security in the manner specified in art. 149 of the FC. This was another reason why it would be legally incorrect to conclude that the POCA only applied to citizens and not to non-citizens. The POCA applied to both citizens and non-citizens or foreign nationals. The High Court ought to have ordered *habeas corpus* in all these appeals at the material time. (paras 198-200)

A ***Bahasa Melayu*** *Headnotes*

Terdapat dua set rayuan yang timbul ekoran permohonan-permohonan *habeas corpus* yang didengar oleh dua Hakim Mahkamah Tinggi ('HMT') berbeza. Perayu-perayu adalah warganegara Republik China yang ditahan berkaitan 'the organization and implementation of online gambling' bawah Akta
B Pencegahan Jenayah 1959 ('APJ'). Set pertama rayuan berkaitan enam permohonan ('set pertama permohonan') manakala set kedua berkaitan 19 pemohonan ('set kedua permohonan'). Tempoh penahanan sudah luput walaupun kesemua perayu berada dalam tahanan semasa pelupusan rayuan mereka di Mahkamah Tinggi. Di Mahkamah Tinggi, perayu-perayu dalam
C (i) set pertama permohonan memohon pengisytiharan bahawa tangkapan, reman dan penahanan mereka, bawah ss. 3, 4 dan/atau mana-mana peruntukan statutori APJ tidak sah atas alasan tangkapan dan penahanan sedemikian *ultra vires* APJ; dan (ii) set kedua permohonan mencabar kesahan penahahan mereka bawah peruntukan-peruntukan APJ, bawah per. 5(2)
D Perlembagaan Persekutuan ('PP'). Asas utama cabaran dalam kedua-dua set adalah serupa, khususnya bahawa perjudian dalam talian tidak terangkum dalam skop APJ dan APJ tidak terpakai pada warganegara asing. Set pertama permohonan ditolak atas alasan kesemuanya akademik. Walau bagaimanapun, HMT memutuskan APJ terpakai pada warganegara asing dan bukan
E warganegara Malaysia sahaja. Set kedua permohonan juga ditolak tetapi, oleh kerana perayu-perayu dalam tahanan, isu permohonan-permohonan menjadi akademik tidak timbul. Dalam rayuan-rayuan ini, isu-isu yang timbul untuk diputuskan adalah: (i) sama ada rayuan-rayuan, keseluruhannya, sudah akademik; (ii) sama ada perjudian dalam talian *simpliciter* terangkum dalam skop APJ; dan (iii) sama ada APJ terpakai pada bukan warganegara atau
F warganegara asing atau terhad pada warganegara Malaysia sahaja.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

G **(1)** Tugas berperlembagaan Mahkamah Tinggi adalah menilai kesahan mana-mana penahanan – khususnya penahanan pencegahan – bermula dari tarikh pemfailan permohonan *habeas corpus*. Bidang kuasa Mahkamah Tinggi atau Hakim Mahkamah Tinggi tidak diputuskan berdasarkan fakta penahanan fizikal tetapi kesahan penahanan itu
H sendiri. Dilihat dari sudut ini dan memberi kesan penuh pada per. 5(2) PP, fakta bahawa detenu, selepas tarikh pemfailan permohonannya, ditahan demi pencegahan tidak menjejaskan haknya untuk memperoleh penelitian kehakiman terhadap kesahan penahanan asalnya. Fakta bahawa detenu sudah dilepaskan selepas tarikh permohonan difailkan,
I tetapi sebelum tarikh pendengaran, juga tidak menjejaskan bidang kuasa

mahkamah menyemak kesahan penahanan yang dicabar. Fakta bahawa detenu sedang dalam tahanan semasa pendengaran tetapi dilepaskan selepas rayuan ke Mahkamah Persekutuan difailkan tidak menjadikan permohonan itu 'akademik'. Berkaitan set pertama permohonan, fakta bahawa penahanan adalah bawah s. 19A APJ, dan bukan s. 4(1) APJ, tidak menjadikan permohonan-permohonan tersebut akademik kerana, pada tarikh pemfailan permohonan-permohonan, perayu-perayu sememangnya ditahan bawah s. 4(1)(a) APJ. Tambahan lagi, permohonan-permohonan secara khusus memohon pelepasan daripada penahanan bawah peruntukan-peruntukan ss. 3, 4 dan mana-mana peruntukan APJ. Ini, dengan sendirinya, mewajarkan mahkamah melihat pada hal perkara tersebut, berdasarkan tugas wajib berperlembagaannya untuk menyemak bawah per. 5(2) PP. Berkaitan set kedua permohonan, fakta bahawa mereka kini bebas daripada penahanan bawah APJ tidak sama sekali mengecualikan mereka daripada mencabar keputusan Mahkamah Tinggi tentang isu ini.

(2) Keputusan minoriti oleh Tengku Maimun Tuan Mat KHN, dalam *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors* ('*Zaidi Kanapiah*'), mencerminkan pendekatan betul untuk diguna pakai dalam memutuskan sama ada perjudian dalam talian *simpliciter* terangkum dalam skop perenggan 5 Bahagian I Jadual Pertama APJ. Perjudian dalam talian *simpliciter* tidak terangkum dalam skop atau ruang lingkup APJ kerana tiada kaitan antara perjudian dalam talian dan keganasan terancang seperti yang digambarkan dalam APJ. Perjudian dalam talian dan keganasan terancang adalah dua hal perkara berasingan dan sangat berbeza. Tidak cukup untuk mewajarkan satu kesimpulan bahawa apabila terdapat perjudian dalam talian *simpliciter*, ini mesti diikuti, sebagai satu aturan, dengan keganasan terancang. Hanya apabila kedua-dua elemen wujud iaitu 'perjudian dalam talian' dan 'keganasan terancang' barulah hal perkara tersebut terangkum sebagai layak bawah APJ. Fakta bahawa beberapa atau banyak permainan haram boleh mengakibatkan keganasan tidak mewajarkan kesimpulan bahawa perjudian dalam talian *simpliciter* semestinya termasuk keganasan terancang semata-mata. Oleh itu, mahkamah terpaksa menyimpang daripada keputusan majoriti dalam *Zaidi Kanapiah* berkaitan sama ada perjudian dalam talian *simpliciter* terangkum dalam skop APJ. Perjudian dalam talian *simpliciter* tidak terangkum dalam skop perenggan 5, Bahagian I, Jadual Pertama APJ.

(3) Penggunaan perkataan-perkataan 'person' dalam per. 151(1)(a) PP dan 'citizen' dalam per. 151(1)(b) PP disengajakan. Perkara 8(1) PP tidak dilanggari. Pengelasan antara warganegara dan bukan warganegara adalah pengelasan munasabah kerana perbezaan kedua-duanya ketara,

jelas dan rasional. Tujuan per. 151(1)(a) PP adalah agar selaras dengan prinsip-prinsip asas keadilan semulajadi dengan memastikan mana-mana orang, warganegara atau bukan warganegara, yang ditahan bawah perundangan yang diisytiharkan bawah per. 149 PP, dimaklumkan tentang alasan-alasan penahanannya dan diberi peluang membuat representasi ekoran penahanan tersebut. Berdasarkan perbezaan yang boleh difahami antara warganegara dan bukan warganegara atau warga asing, khususnya dalam konteks sifat tunggal per. 149 PP yang berkaitan dengan kuasa-kuasa khas yang diberi pada Parlimen berkaitan keselamatan negara dan darurat, ketiadaan peruntukan perlindungan lanjut ini dalam per. 151(1)(b) PP tidak melanggar per. 8(1) PP. Ini khasnya kerana asas keadilan semula jadi diberi pengiktirafan dan kesan dalam per. 151(1)(a) PP. Pembacaan APJ sendiri mendedahkan bahawa tiada apa-apa dalam APJ yang mendiskriminasikan warganegara dan bukan warganegara kerana rujukan dibuat pada 'person'. Walaupun dengan ketiadaan syarat wajib bawah per. 151(1)(b) PP, kesemua perayu diberi peluang didengar oleh Lembaga Penasihat yang ditubuhkan bawah APJ dan telah mengemukakan representasi masing-masing. Oleh itu, mereka tidak dinafikan perlindungan tambahan yang diperuntukkan bawah per. 151(1)(b) PP. Ini juga mengurangkan apa-apa kemungkinan pelanggaran per. 8(1) PP dalam rayuan-rayuan ini.

(4) Perkara 149(1) PP membayangkan pengisytiharan perundangan, termasuk perundangan penahanan pencegahan, apabila satu badan besar 'persons whether inside or outside the Federation' menyebabkan atau mengugut subversi, keganasan terancang atau jenayah-jenayah yang memprejudis awam dan juga keadaan-keadaan darurat. Dalam mengisytiharkan perundang sedemikian, Parlimen, oleh itu, tidak menghadkannya pada warganegara sahaja. Terbuka buat Parlimen untuk menggubal terhadap 'persons' amnya, iaitu termasuk yang bukan warganegara atau warga asing, jika mereka terlibat dalam perilaku-perilaku yang membentuk ugutan besar terhadap keselamatan negara dalam keadaan yang dinyatakan dalam per. 149 PP. Ini satu lagi sebab kenapa adalah tidak sah, bawah undang-undang, untuk memutuskan bahawa APJ hanya terpakai pada warganegara sahaja dah tidak pada bukan warganegara. APJ terpakai pada kedua-kedua warganegara dan bukan warganegara atau warga asing. Mahkamah Tinggi seharusnya memerintahkan *habeas corpus* dalam kesemua rayuan ini pada masa material.

Case(s) referred to:

Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [2006] 1 CLJ 977 CA ***(refd)***

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Kanyu Sayal v. District Magistrate, Darjeeling 1974 AIR 510 ***(refd)***

Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653 FC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(refd)***

PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***

R v. Secretary of State for the Home Department ex p Stafford (1998) 1 WLR 503 ***(refd)***

R v. Secretary of State for the Home Department, Ex parte Khawaja [1982] 2 All ER 523 ***(refd)***

Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs [2012] UKSC 48 ***(refd)***

Re Onkar Shrian [1969] 1 LNS 155 HC ***(refd)***

Sejahratul Dursina v. Kerajaan Malaysia & Ors [2006] 1 CLJ 593 FC ***(refd)***

Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 2 CLJ 29 ***(refd)***

Theresa Lim Chin Chin & Ors v. Inspector General Of Police [1988] 1 LNS 132 SC ***(refd)***

Thomas John Barnado v. Mary Ford [1892] AC 326 ***(refd)***

Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Arasa Kumaran [2006] 4 CLJ 847 FC ***(refd)***

Union of India v. Yumnam Anand (2007) 10 SCC 190 ***(refd)***

Vijay Narain Singh v. State of Bihar (1984) 3 SCC 14 ***(refd)***

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), Schedule para 1

Criminal Procedure Code, s. 365

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (2), (3), 6

Federal Constitution, arts. 5(1), (2), 8(1), 9, 10, 13, 149(1)(a), (b), (c), (d), (e), (f), 151(1)(a), (b)

Interpretation Acts 1948 and 1967, s. 17A

Prevention of Crime Act 1959, ss. 3, 4(1)(a), (b), (2)(a), 10A, 19, 19A(1)

Other source(s) referred to:

RJ Sharpe, *The Law of Habeas Corpus,* 2nd edn, pp 180-181

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For the respondents - Muhammad Sinti, Farah Ezlin Yusop Khan, Nur Jihan Mohd Azman, Farasyeriza Md Zabani & Anasuha Atiqah Mat Saidi; SFCs

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Application Nos: WA-44-220-12-2020, 44-222-12-2020, 44-219-12-2020, 44-221-12-2020, 44-223-12-2020, 44-224-12-2020, 44-79-04-2021, 44-84-04-2021, 44-88-04-2021, 44-85-04-2021, 44-92-04-2021, 44-89-04-2021, 44-86-04-2021, 44-90-04-2021, 44-83-04-2021, 44-80-04-2021, 44-93-04-2021, 44-82-04-2021, 44-81-04-2021, 44-91-04-2021, 44-87-04-2021, 44-96-04-2021, 44-95-04-2021, 44-78-04-2021 & 44-94-04-2021 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] There are two series of cumulative appeals before us relating to preventive detention under the Prevention of Crime Act 1959 ("POCA") brought by all the appellants, who were detainees at the time of the filing of their applications for *habeas corpus* and other declaratory relief. The periods of detention have since expired, although all the appellants were in detention at the time of the disposal of their appeals before the High Court.

[2] The first set of appeals deals with six cases, while the second set of appeals deals with 19 cases. In both sets of appeals, the appellants were detained under POCA in relation to 'the organization and implementation of online gambling' which was stated to be in contravention of the provisions of POCA.

The High Court

[3] Both sets of cases were heard before two different judges of the High Court of Malaya in Kuala Lumpur. The set of six appeals sought to challenge the remand and detention of the appellants under s. 4(1)(a) POCA, although the application cited s. 4 as well as all the provisions of POCA, and further sought declarations that the arrest and remand of these detainees were unlawful because online gambling did not fall within the purview or scope of POCA. It was further contended that POCA did not apply to foreign nationals.

[4] The set of 19 appeals sought to challenge the detention of the appellants under s. 19A of POCA. It also sought declarations that the detention of these appellants was unlawful because online gambling did not fall within the purview or scope of POCA. Similarly, it was contended that POCA did not apply to foreign nationals.

[5] It is evident that the primary basis for challenge in both sets of appeals is identical, namely that online gambling does not fall within the purview of POCA and secondly that POCA does not apply to foreign nationals.

[6] In the first set of six appeals, the additional issue of the applications being academic, as the relevant period of remand and detention under s. 4(1)(a) POCA having expired, was also raised.

[7] At first instance, both judges dismissed all the applications filed by the applicants. The first set of six applications was dismissed on the preliminary point of the applications being academic. Notwithstanding this, the High Court Judge went to determine one of the substantive points in issue, namely that POCA does apply to foreign nationals and not only to Malaysian citizens.

[8] As for the set of 19 applications the other High Court Judge similarly dismissed the applications. The issue of the applications being academic did not arise as the applicants were then in detention.

The Federal Court

[9] On appeal, this issue of both sets of appeals being academic, as the relevant periods of detention had expired, was raised before us. This resulted in three identical primary issues being raised before us namely:

(i) by way of a preliminary issue raised by the detaining authority, ie the respondents: Whether the appeals as a whole were academic. The rationale behind this is that an application for release or *habeas corpus* can only be directed at the presently subsisting order of detention. If that detention has expired then the issue becomes academic;

(ii) whether online gambling *simpliciter* falls within the scope of POCA; and

(iii) whether POCA applies to non-nationals or foreign nationals or is restricted to Malaysian citizens.

[10] We dealt with both sets of appeals together, namely the set of six appeals, as well as the 19 appeals, because the issues raised were the same. At the end of the hearing, we issued a brief unanimous judgment as follows:

On the preliminary issue of the Appeals being Academic:

(a) We agree with the decision in *Zaidi Kanapiah* that the appeals are not academic because the applications have to be looked at or considered from the date of the filing of the applications for *habeas corpus* under Article 5(2) of the Federal Constitution; secondly it is incumbent upon this Court to decide on whether the High Court was correct in deciding as it did. Therefore, there is a live issue here;

(b) The process of detention of the appellants must be looked at as a whole because the entire process is inter-related. If one of the processes is tainted, the entire process is questionable requiring us to look into it.

On the Substantive Issues

(a) This is our unanimous decision. There remain two issues to be considered namely whether online gambling *simpliciter* falls within the purview of the Prevention of Crime Act 1959 ('POCA') and secondly whether POCA applies to non-citizens. We shall deal with the second issue first.

(b) On the second issue, we are not persuaded that POCA is only applicable to citizens. Looking at the scheme of POCA as a whole, coupled with the provisions of the FC in Article 151 FC, it is our judgment that it applies to both citizens and non-citizens.

(c) On the first issue we are of the view that the recital of POCA is only in respect of Article 149(1)(a) FC as we interpret it, and it is trite that any restrictive provision of the FC such as the power to promulgate preventive detention and any such preventive detention legislation, must be read narrowly and restrictively because it encroaches on the provisions of the fundamental liberties as set out in Part II of the FC.

(d) We are therefore of the firm opinion that the recital in POCA does not extend to online gambling *simpliciter*. There must be a factual basis that involves organized crime as envisaged in Art 149(1)(a) FC.

(e) Looking at the Statement of Facts, there is only evidence of gambling online *simpliciter*. And no element of organised violence. As online gambling is outside the intended scope of POCA, it follows that the detentions are all bad in law. The High Court Judges ought to have issued writs of *habeas corpus*. All the appeals are therefore allowed and the judgments of the High Court set aside. We shall provide full grounds in due course.

[11] We now provide the full grounds for our decision. It is necessary, at the outset to set out the factual matrix pertaining to the arrest and detention of the appellants in both sets of appeals. We deal firstly with the set of six appeals and then the 19 appeals.

The Set Of Six Appeals – Appeals Nos. 05(HC)-38-03-2021(W), 05(HC)-41-03-2021(W), 05(HC)-43-03-2021(W), 05(HC)-42-03-2021(W), 05(HC)-44-03-2021(W) & 05(HC)-45-03-2021(W)

[12] The first set of six appeals concern applications by six nationals of the People's Republic of China, seeking orders declaring that their arrest, remand and detention under ss. 3, 4 and/or any of the statutory provisions of the Prevention of Crime Act 1959 ("POCA"), is illegal, on the grounds that such arrest and detention is *ultra vires* or outside the scope of POCA. The grounds stipulated for their detention is their involvement in the organisation and promotion of unlawful online gambling.

[13] In their applications, the six appellants also sought immediate release from detention, *via* the remedy of *habeas corpus*. The respondents named in their applications who are now respondents in the six appeals are:

(i) the police officer who initially arrested the six nationals who is named as the first respondent;

(ii) the Magistrate who authorised the six appellants' remand and detention, who is named as the second respondent;

(iii) the Inspector-General of Police, Malaysia named as the third respondent; and

(iv) the Government of Malaysia, named as the fourth respondent.

Chronology Of Salient Events

[14] The six appellants were arrested on 2 November 2020.

[15] The following day, on 3 November 2020, the Magistrate (who is the second respondent here) made the initial remand and detention orders pursuant to s. 4(1)(a) POCA, for a period of 21 days from 3 November 2020 until 23 November 2020.

[16] On 23 November 2020, the Magistrate issued a further remand order under s. 4(1)(b) POCA for a period of 38 days from 23 November 2020 until 30 December 2020.

[17] On 8 December 2020, the Prevention of Crime Board ("the Board") made a detention order against the fifth appellant for a duration of six months under s. 19A(1) POCA.

[18] On 17 December 2020, the Board made similar detention orders against the first, second, fourth and sixth appellants respectively for a duration of six months under s. 19A(1) POCA.

[19] On 21 December 2020, the Board issued a detention order against the third appellant for a duration of six months under s. 19A(1) POCA.

[20] On 3 December 2020, prior to the issuance of the detention orders by the Board under s. 19A(1) POCA, the appellants filed their application for *habeas corpus* and the corresponding declaratory relief as set out in their originating summonses.

[21] The *habeas corpus* applications came up for hearing on 29 December 2020.

[22] By this date, the Board had issued detention orders against all of the appellants. In other words, the initial detention of the six appellants under s. 4(1) POCA had expired and been replaced by detention orders made by the Board pursuant to s. 19A(1) POCA, against each of the six appellants, for a period of six months.

[23] However, it is also to be noted that the second extended remand order issued by the Magistrate for a period of 38 days remained in force until 30 December 2020.

Preliminary Issue Before The High Court – The Applications For Release Or *Habeas Corpus* Are Academic

[24] Senior Federal Counsel ("SFC") acting for the respondents maintained at the hearing of these appeals that the application for, *inter alia*, the writ of *habeas corpus* had become academic since the remand order being challenged was no longer in existence. It was submitted by the SFC that the remand order under s. 4(1)(a) POCA had been replaced with a detention order under s. 19A(1) POCA which was issued by the Board and not the Magistrate. Accordingly, the application, it was contended, was academic.

[25] The High Court allowed the preliminary objection, agreeing with the aforesaid submission, and additionally relying on a series of cases including *Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [2006] 1 CLJ 977; *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2010] 7 CLJ 653 and *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 ("*Faizal Haris*")

[26] The last two cases are authority for the proposition that a writ of *habeas corpus* must be directed against an existing order of detention as a general rule. Therefore, where a valid detention order is made in respect of a current detention the irregularity or invalidity of any earlier arrest or detention is not amenable to review or the grant of the remedy of *habeas corpus.*

[27] The High Court then went on to dismiss all the applications for *habeas corpus* on this ground alone. Although this was the primary basis for the dismissal of the applications, the High Court then went on to consider the second issue of whether POCA applied to non-citizens and concluded that it did. In so concluding, the High Court held, *inter alia* that on a perusal of the long title, preamble and the enacting provisions of POCA, read with the assistance of the rationale in the case of *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29 that it was clear that the objective of POCA was to prevent crime and control of criminals without limiting its application to just the citizens of Malaysia. The judge went on to hold that it is applicable to all persons arrested under the Act regardless of their nationality.

The 19 Appeals – 05(HC)-106-06-2021(W), 05(HC)-107-06-2021(W), 05(HC)-108-06-2021(W), 05(HC)-109-06-2021(W), 05(HC)-110-06-2021(W), 05(HC)-110-06-2021(W), 05(HC)-112-06-2021(W), 05(HC)-113-06-2021(W), 05(HC)-114-06-2021(W), 05(HC)-115-06-2021(W), 05(HC)-116-06-2021(W), 05(HC)-117-06-2021(W), 05(HC)-118-06-2021(W), 05(HC)-119-06-2021(W), 05(HC)-120-06-2021(W), 05(HC)-121-06-2021(W), 05(HC)-122-06-2021(W), 05(HC)-123-06-2021(W) & 05(HC)-124-06-2021(W)

[28] The second set of 19 appeals pertains to the legality of the detention of 19 persons of the People's Republic of China under the provisions of the Prevention of Crimes Act 1959 ("POCA") pursuant to art. 5(2) Federal Constitution ("FC") read together with s. 25(2) of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code. These 19 persons were detained under POCA on the grounds of their involvement in the organisation and promotion of unlawful online gambling.

[29] Soon after the arrest of the appellants, applications for *habeas corpus* were filed in the High Court on 3 December 2020. By this time, the period of initial remand and detention under s. 4 POCA had expired and they continued to be detained pursuant to orders issued by the Prevention of Crime Board ("Board"), pursuant to s. 19A, for a further period of six months.

[30] The initial application made by the 19 appellants centred on the illegality of their initial arrest and detention under ss. 3 and 4 of POCA. The second application made by the 19 appellants related to the illegality of their detention pursuant to the decision of the Board pursuant to s. 10A. The basis for challenging the legality of their detention was that such preventive detention was illegal because:

(i) it was outside the scope of, or *ultra vires* POCA; and

(ii) it had no application to them as they are Chinese nationals.

[31] Having set out the factual matrix underlying all the appeals that were before us on 7 January 2021, we proceed to set out our full reasoning and consideration for the decision we made.

[32] The first issue that arises for consideration is whether:

(i) the application for release or *habeas corpus* in the six appeals was academic at the point in time when it was heard before the High Court Judge, because the initial period of remand and detention of 21 days under s. 4(1)(a) of POCA had expired; and

(ii) the appeals against the order of the High Court Judge in the 19 appeals was academic at the point in time when it was heard on appeal before us, because the period of detention of six months had elapsed.

A **The Academic Point In Both Sets Of Appeals**

[33] The starting point to answer this question relates back to the basis for the entitlement of the appellants to seek judicial redress for detention which they claim is unlawful. The foundational basis for such redress is encapsulated in art. 5(2) of the FC. It provides:

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> 5(2) Where **complaint** is made to a High Court or any judge thereof that a person **is being unlawfully detained** the **court shall inquire** into the complaint and, **unless satisfied** that the **detention is lawful, shall** order him to be **produced before the court and release him.** (emphasis added)

C **[34]** Article 5(2) FC encapsulates a constitutional right of review of the detention which the complainant maintains is unlawful. It encompasses a two-fold duty on the High Court, namely:

(i) it places a duty or legal obligation on the High Court or a High Court Judge to inquire into that complaint to as certain the legality of the

D detention; and

(ii) it requires the High Court or High Court Judge to produce the detainee before the court and release the detainee, unless the court is satisfied that the detention is lawful.

E **[35]** But what is the position where the complainant was initially unlawfully detained, but upon expiry of such initial unlawful detention, then subjected to a second period of detention under a separate and seemingly valid order of detention. Does the fact that the initial unlawful detention has expired, and the existence of a second detention order, preclude the detainee from being heard on the legality of the initial detention under art. 5(2) FC?

F Is the detainee then consequentially denied the right of release or *habeas corpus*?

[36] The detainee claiming unlawful detention generally makes an application seeking release while in detention. The hearing of the application before the court can, however, arise when the period of detention has

G expired, and been replaced with detention under a different provision of the preventive detention legislation, different legislation, or even when the detainee has been released. Does that mean that the entitlement to have the term of 'unlawful detention' examined by the court no longer subsists? In other words, is the constitutional entitlement of the detainee under art. 5(2)

H FC to have the legality of the detention reviewed, eradicated or eliminated, simply by reason of the expiry of the detention?

[37] The scheme of Part II of the FC, more particularly art. 5(2) FC, would be frustrated and rendered nugatory if a person could be detained for a length of time unlawfully, and he is released just prior to the hearing of his

I application for *habeas corpus*, notwithstanding that he filed it during the

period that he was detained. In other words, the paramount importance of art. 5(2) FC and the fundamental safeguard it provides against liberty may be dispensed with by:

(i) treating the several different periods and types of detention order all issued pursuant to a single piece of legislation as comprising separate and discrete silos that are to be considered separately;

(ii) utilising the expiry of an order of detention as a ground for precluding the constitutional right of review under art. 5(2) FC; and

(iii) releasing a detainee early with a view to evading the constitutional right of review under art. 5(2) FC.

[38] There may well be a series of other situations that may result in the liberty of the detainee, prior to the legality of his detention being examined. The question that arises for consideration is whether the purpose and object of art. 5(2)FC can be evaded or avoided by the foregoing factors. The answer is a resounding no.

[39] The only reasonable and legally coherent construction to be afforded to art. 5(2) FC, which construction necessarily incorporates the principle of proportionality as enunciated in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 (FC), is as follows:

(i) The court, when determining this issue, is to examine it from the point in time when the applicant or aggrieved person was in detention under the particular detention order comprising the basis of complaint. The court is bound to consider the plea for an investigation into the legality of what is said to be an unlawful detention, from and through the eyes of the complainant, namely the detainee. If the entitlement to review is to be viewed through the lens of the detainee, then the proper point at which the review is undertaken, is at the point in time when the detainee makes the complaint of unlawful detention.

(ii) And the point of time when the detainee makes the complaint of unlawful detention is fixed or evidenced by the date when he files his application seeking a review and release from such detention.

[40] To that end, the point of time at which the complainant makes or files the complaint is crucial, as the court is bound to consider whether the detention is unlawful or lawful at the time when the application for *habeas corpus* was made.

[41] It follows that it is incorrect to undertake the review of the detention when the application for *habeas corpus* is finally heard in court, as a considerable amount of time is likely to have lapsed by that time, and subsequent events may have overtaken the initial remand and detention complained of.

[42] This also means that any subsequent action taken to place the detainee under a new or separate form of detention, or even to release the detainee, does not undermine or stultify the court's express duty to scrutinise the detention with a view to satisfying itself that such detention is indeed legal and valid under the relevant preventive detention laws.

[43] The legal position that the relevant time at which the court undertakes its inquiry into the legality of the detention is at the point of the filing of the complaint by the detainee, is set out comprehensively in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581 ("*Zaidi Kanapiah*") at para. 229, where the Chief Justice Tengku Maimun Tuan Mat held, *inter alia*, as follows:

> [229] … The judgments in *Kanyu Sayal* and *Theresa Lim* coherently flow with the line of reasoning adopted by this court in *Ezam*. The foregoing authorities establish the proposition that when a person is detained the legality of his detention is to be adjudicated by reference to the date the application for a writ of *habeas corpus* is filed. The detaining authorities are not permitted to 'shift the goal post' – so to speak – by alleging that further or subsequent detentions have been made with a view to render the argument on the impugned detention academic. In other words, the detaining authority cannot rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of *habeas corpus*. Accepting such an argument would amount to condoning an abuse of the process of the court and would unduly narrow the interpretation of art. 5(2) – a safeguard of a fundamental liberty – against settled constitutional cannons of interpretation. It would also render the safeguard in art. 5(2) illusory.

[44] By way of reminder, *Kanyu Sayal v. District Magistrate, Darjeeling* 1974 AIR 510 ("*Kanyu*") stated as follows:

> … It is now well settled that the earliest date with reference to which the legality of the detention challenged in a *habeas corpus* proceeding may be examined is the date on which the application for *habeas corpus* is made to the Court. This Court speaking through Wanchoo J (as he then was) said in *AK Gopalan v. Government of India* (1966) 2 SCR 427 AIR 1966 SC 816:
>
> > It is well settled that in dealing with the petition for *habeas corpus* the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of hearing.

[45] The case then goes on to consider earlier decisions of the Indian courts where a slightly different view was taken, namely that the relevant date for the purposes of determining the legality of the detention was the time of the return (or the return date). This particular view was stated to be consonant

with the law and practice in England and was approved in India. And a third option proffered in another decision of the High Court of India was the date of the hearing before the judge.

[46] In conclusion, however, the Indian Supreme Court held in *Kanyu* that the earliest date at which the legality of detention may be examined is the date of filing of the application for *habeas corpus* and "... the court is not concerned with a date prior to the initiation of the proceedings for a writ of *habeas corpus*".

[47] There are therefore three possible scenarios which arise as to when the legality of the detention under art. 5(2) FC is to be examined:

(i) as of the date when the application for such constitutional review coupled with the remedy of *habeas corpus*, is made ie, the date of the filing of such application;

(ii) at the return date of the application; and

(iii) at the date of the hearing of the application.

[48] In *Zaidi Kanapiah*, the date of filing of the *habeas corpus* application was held as the earliest defining date for the court to hold its inquiry. This is in keeping with the rationale set out earlier in this judgement, namely that art. 5(2) FC envisages that the legality of the detention is reviewed by the High Court through the eyes of, or in the shoes of the detainee making the complaint. It then follows that the relevant date is the date when the complaint is made, which, for practical purposes, is to be ascertained from the date of the filing of the application seeking *habeas corpus*. To that extent, we expressly reaffirm the reasoning and decision arrived at in *Zaidi Kanapiah* on the issue of the relevant date to be taken into consideration when reviewing the legality of a detention under art. 5(2) FC.

[49] This issue of whether the remedy under art. 5(2) FC is available to an applicant who has been released following the initiation of the application ought also to be dealt with (although not strictly relevant on the present fact scenario). The scheme of our FC envisages that the constitutional right to review of the legality of a detention can only be effectively discharged through an application for *habeas corpus*. That right accorded under art. 5(2) FC would be frustrated if a person, after being committed was then detained under a different provision of the same application for such review was made. While the reality in practice is that usually an application for *habeas corpus* is unlikely to proceed where the detainee has been released since the initiation of the application, it does not follow that his right of review has become extinct. The reality is that the remedy that follows such review has been achieved and therefore the application may not be necessary.

A **The Difference Between The Academic Issue In The Six Appeals Versus The 19 Appeals**

[50] There is a distinct and specific difference between the matters becoming academic in the first set of six appeals and the second set of 19 appeals.

B **The Academic Issue In The Six Appeals**

[51] The issue in the first set of six appeals relates to whether the expiry of the first period of remand and detention pursuant to s. 4(1)(a) POCA, leaves the High Court bereft of, or without jurisdiction to consider or C determine the legality of the continued detention of the six applicants under ss. 4(2) POCA and/or 19A POCA. The 'academic' issue here relates to whether a subsequent or succeeding order of detention under a different provision of POCA deprives the High Court of examining the prior order of detention issued under an earlier or different provision.

D More specifically the 'academic' issue in this set of six appeals relates to how succeeding orders for detention under different sections of POCA or any other such preventive legislation are to be treated:

(i) discretely or separately, as if they are in silos and wholly disparate and distinct; or

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(ii) as one overarching or all-encompassing detention.

[52] The answer to this 'academic' point would also encompass a situation where a detainee's detention is halted and he is detained under different preventive legislation to avoid judicial scrutiny under art. 5(2) FC.

F **The Academic Issue In The 19 Appeals**

[53] The 'academic' issue in the second set of 19 appeals relates to whether the expiry of the detention under POCA for all the appellants, leaves the Federal Court shorn of, or without jurisdiction, as an appellate court, to hear G and adjudicate, on the correctness of the decision of the High Court on the legality of the detentions. This relates to whether a matter which is live and capable of review under art. 5(2) FC in the High Court, becomes academic on appeal by reason solely of the detainees no longer being in detention.

[54] It should be emphasised that the issue of the application has become H academic takes on a different dimension when the application is considered at first instance by the High Court, and on appeal before this court. This is because art. 5(2) FC provides for the hearing at first instance before the High Court or a judge of the High Court. Therefore, when a matter is then brought on appeal before the Federal Court it becomes incumbent upon this court to I exercise its appellate powers to ascertain whether or not the High Court

Judge was correct in his reasoning, and as a whole. To that extent the Federal Court judicially scrutinises the appeal from the viewpoint of the High Court Judge, meaning specifically, the point in time when the matter was heard before the High Court Judge. This therefore makes the issue of the correctness or otherwise of the decision of the High Court a 'live' issue. This rationale is borne out by the reasoning of this court in *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 449 ("*Ezam*").

[55] In *Ezam*, Abdul Malek Ahmad FCJ held that the issue of the legality of the detention remained 'live' even when a detainee had been released as of the date of the hearing of the *habeas corpus* appeal, because that issue remained alive by reason of the finding of the High Court that the detentions were lawful. In other words, the fact that the High Court arrived at a finding of legality on its review, warranted an appellate court to undertake a consideration of the High Court's finding to ascertain whether the scrutiny or review was correct. The right of appeal of either a detainee or the relevant authority would be rendered nugatory if that were not the case. Equally the correctness of the decision of the High Court could not be ascertained or rectified, if necessary.

'Academic' Issue Goes To Jurisdiction In Both Instances

[56] However, in both sets of appeals, the academic issue relates directly to the jurisdiction of the relevant courts. Jurisdiction comes into play because in the first case the contention is that as the first detention order has lapsed, the detainee being held under some other provision for detention, the jurisdiction to examine the first detention no longer subsists. And that, the legal argument goes, is because the fact of physical detention under the first detention is no longer in existence. As the jurisdiction to issue the remedy, it is argued, is premised on the fact of such physical detention, the expiry or absence of such physical detention, deprives the court of its jurisdiction.

[57] In the second case the contention is that as the detainee is no longer in detention or has been released when the appeals are heard, the jurisdiction to examine the detention no longer subsists. Again, the basis is that the physical detention having 'expired' or 'lapsed' the court has no jurisdiction to confer the remedy of *habeas corpus*. And that in turn is based on the rationale that the court's jurisdiction to confer the remedy is predicated on the fact of physical detention.

[58] However, both instances of the 'academic' issue are predicated on the basis that the entitlement of the detainee to have the detention scrutinised, turns on the subsistence of physical detention of the detainee. In other words, it is contended that the right of the High Court to grant the remedy of *habeas corpus* or release is predicated on the physical fact of detention. Equally it is

A suggested that the Federal Court's jurisdiction to adjudicate on the correctness of the High Court's review is similarly predicated on the fact of continuing physical detention.

[59] The issue for consideration is whether that legal premise is correct.

B **The Academic Point In *Zaidi Kanapiah***

[60] In *Zaidi Kanapiah*, the Chief Justice Tengku Maimun Tuan Mat, whose judgment on this point represents the view of the court as a whole, held conclusively that the case of *Ezam* represents the correct position in law and ought to be followed rather than *Faizal Haris; L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 C CLJ 653; [2018] Supp MLJ 393 ("*Rajanderan*") and other cases such as *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81; [2003] MLJU 841 ("*Nasharuddin Nasir*") and *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687; [2006] 6 MLJ D 403. The Chief Justice went on to specifically hold that any other related decisions which departed from *Ezam* are no longer good law, and cannot be relied upon for the academic point raised by the respondents. This aspect of the decision is therefore binding on all lower courts in accordance with the doctrine of *stare decisis*.

E **[61]** Notwithstanding the clear explanation and acceptance of *Ezam* as representing the correct position in law, and the rejection of *Faizal Haris* and *Rajanderan*, (both decisions of this court subsequent to *Ezam*, by a three-member bench) another three-member coram of this court in the case of *Goh Leong Yong v. ASP Khairul Fairoz Rodzuan* ("*Goh*") held by a majority of 2:1, F that the challenge by the detainees was in point of fact academic, thereby failing to give effect to the recent majority decision in *Zaidi Kanapiah*.

[62] The majority held that the reasoning in *Zaidi Kanapiah* is incorrect. The minority maintained that the decision on the academic point was correct and prevailed.

G **[63]** It is of importance to note that the factual matrix and legal issues in *Goh* are identical to the issues in *Zaidi Kanapiah* and the present series of appeals. Until the present decision therefore, there were the conflicting decisions of this court in *Zaidi Kanapiah* where a coram of four out of five judges expressly held that the decision in *Ezam* reflects the correct legal H position and reasoning, on the academic point, versus the decision of the majority in *Goh*, comprising two judges out of three, who maintain that *Ezam* and thereby *Zaidi Kanapiah* are flawed in their reasoning and that the reasoning in *Faizal Haris, Nasharuddin Nasir* and *Rajanderan* is preferable. (The fifth judge in *Zaidi Kanapiah*, while agreeing that the point was not academic I did not expressly concur with the other four judges, maintaining that it was 'in the interests of justice' to hear the appeals).

[64] It therefore behoves us to examine the legal reasoning in these two parallel lines of cases to determine which line of cases is in point of fact correct. That therefore brings us to a consideration of the reasoning in *Goh* as well as *Zaidi Kanapiah*. It should be stressed that in all these cases the factual matrix is such that at the time of the filing of the writ of *habeas corpus*, the detainees were all in remand under s. 4(1)(a) POCA and by the time the applications were heard in the High Court, such detention had expired, to be replaced by a period of detention under s. 4(2)(a) for a period of 38 days.

The Majority Decision In Goh

[65] The majority decision in *Goh* maintains that "… a writ of *habeas corpus* is only available to a person who is being physically detained unlawfully" relying on the old English case of *Thomas John Barnado v. Mary Ford* [1892] AC 326 ("*Barnado v. Ford*"). It goes on to stipulate that "… in an application for a writ of *habeas corpus*, the remedy is for the release of the persons unlawfully detained and nothing else. Where a person is no longer 'detained' (ie he has already been released under that particular detention order), there is no issue of the writ of *habeas corpus* to be issued, as there is no 'authority' or 'body' that detained him any longer. His release is therefore no longer in issue. A writ of *habeas corpus* has to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. It is used primarily to secure the release of a person detained unlawfully or without legal justification. The court does not have jurisdiction to determine the matter if a person is no longer detained …".

[66] The case of *Re Onkar Shrian* [1969] 1 LNS 155; [1970] 1 MLJ 28 ("*Onkar Shrian*") was relied on, where the court held that:

> … The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*.

[67] This *ratio* was utilised and echoed in subsequent case law like *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 where Steve Shim then CJSS copied and endorsed this legal premise by holding that:

> It is trite law that the remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. **It is the fact of detention which gives the court its jurisdiction.** (emphasis added)

[68] It should be noted here that whereas *Onkar Shrian* specified that it was the illegal detention that was the basis of jurisdiction in an application for *habeas corpus*, the decision in *Nasharuddin Nasir* went further to restrict the availability of the remedy only to situations where the complainant is in actual physical detention. The original criterion of the need to examine the legality of the suspension was altered, changed or varied somewhat, such that

in order to invoke the remedy the fact of physical detention was a necessary element. Without such physical detention, the court no longer possessed the relevant jurisdiction to grant the relief, according to *Nasharuddin Nasir*.

[69] The reliance on *Onkar Shrian* is, with respect, correct in that the decision accurately recognises that it is the legality of the detention which gives the court the jurisdiction to grant the relief, whereas *Nasharuddin Nasir* alters the basis for the grant of the relief by stipulating that the physical detention is the basis for the jurisdiction of the court to grant the remedy. This legal contention does not take into consideration or address the fundamental basis for the grant of the remedy, namely art. 5(2) FC.

[70] This legal reasoning was followed by Abdul Hamid Mohamad FCJ (as he then was, and later CJ) in *Sejahratul Dursina v. Kerajaan Malaysia & Ors* [2006] 1 CLJ 593; [2006] 1 MLJ 405 ("*Sejahratul Dursina*") where the learned judge agreed with the views expressed by Steve Shim CJSS in *Nasharuddin Nasir*, echoing the point as follows:

> [15] Under both provisions (section 365 CPC and art. 5(2) FC) only one remedy is provided ie to set the detainee at liberty or to release him which actually means the same thing. Indeed, that is what *habeas corpus* is about: to release a person who is being detained 'illegally or improperly', to quote the words of s. 365(a)(ii) of the CPC. The person must be under detention. Only then can he be released if the detention is found to be illegal or improper.

[71] While this summarisation is, with the greatest of respect, correct, there was a failure to recognise that *Nasharuddin Nasir* shifted the basis of jurisdiction from the court undertaking a review of the legality of the detention, to jurisdiction stemming solely from the fact of physical detention. This shift in defining how the jurisdiction of the court was derived, effectively made physical detention a necessary element, in order for the remedy of release from unlawful detention to be granted by a court.

[72] It is immediately evident from this line of cases (as well as *Faizal Haris; Rajanderan; Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Arasa Kumaran* [2006] 4 CLJ 847 (*"Arasa Kumaran"*), all decisions of Augustine Paul FCJ (as he then was) that the entire thrust of judicial scrutiny, was on the need for the physical detention of the person in order to obtain the relief or remedy to be afforded, namely *habeas corpus*, placing the review of the lawfulness, or legality of, the detention to a secondary or subordinate position. The core of the court's reasoning in this line of cases was entirely focused on the physical custody of the detainee with the authorities so as to enable the remedy of *habeas corpus* to be granted, rather than on the legality of the detention. This was so, to the extent that even the jurisdiction founding the basis for the grant of the remedy was said to be predicated on the fact of a subsisting or existing detention.

[73] The net result of such legal reasoning is that once the physical custody of the detainee ceases, or changes hands, the remedy of release or *habeas corpus* is simply not available. And equally, if the detention is replaced by another form of detention, reflecting a different stage of the preventive detention process, then too, the remedy of release or *habeas corpus* vanishes.

The English Common Law Writ Of *Habeas Corpus*

[74] Such a line of reasoning may well be in line with the age-old English remedy of *habeas corpus* or the great writ of *habeas corpus* in its earliest forms, which traces its existence from the days of *Magna Carta* and is a creature of the common law. However, that age-old remedy of *habeas corpus* has evolved rapidly to meet modern requirements, such that it is today, no longer simply a procedural device, but is a hybrid of judicial review coupled with the right of release (see *R v. Secretary of State for the Home Department, Ex parte Khawaja*, [1982] 2 All ER 523, [1982] 1 WLR 625).

Article 5(2) FC, The Courts Of Judicature Act 1964, And The Remedy Of *Habeas Corpus* In This Jurisdiction

[75] In this jurisdiction, art. 5(2) FC makes express and mandatory provision for a court to inquire into a complaint of unlawful detention. As stated above, it then becomes incumbent upon the court to undertake an inquiry to satisfy itself that the detention is lawful. It is only if such satisfaction is met that the detention continues. Otherwise, the unlawfully detained person must be released.

[76] It is therefore immediately apparent that the thrust of art. 5(2) FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. The remedy of release which we commonly refer to as *habeas corpus,* is a consequence or remedy consequent upon an inquiry mandatorily required under art. 5(2) FC, and only so available if the detention is found to be unlawful. The jurisdiction of the High Court to grant a remedy of release or *habeas corpus* is therefore derived from art. 5(2) FC.

[77] In other words, it is not possible to avail oneself of the remedy of *habeas corpus in vacuo*, without recourse to art. 5(2) FC. The remedy of *habeas corpus* is available by reason of the additional powers of the High Court specified in Schedule, para. 1, s. 25 of the Courts of Judicature Act 1964 ("CJA"). Section 365 of the Criminal Procedure Code is another statutory provision which assists or aids, but it is art. 5(2) FC that confers the foundational constitutional jurisdiction of review and remedy, namely the entitlement to review the legality of the detention and the remedy of release. These provisions prevail over the English common law remedy. The English common law remedy of *habeas corpus* should not be invoked in support of an application for release from such detention, as we have art. 5(2) and the CJA.

[78] It is therefore imperative that the different jurisdictional bases for the remedy of release from detention pursuant to an application founded on art. 5(2) FC on the one hand, and the separate remedy of *habeas corpus* under the English common law are fully appreciated, and that such concepts are kept separate when applying the law in this jurisdiction.

[79] At the risk of repetition, we say the right to challenge an unlawful detention and obtain an order of release in this jurisdiction is constitutionally protected under art. 5(2) FC, and cannot be viewed as equivalent to the common law-based remedy of *habeas corpus*, whether in its original or present form utilised in that jurisdiction. The existence of statutes affording protection in the form of *habeas corpus* in other jurisdictions is equally of no binding application in this jurisdiction, which is governed by the FC and other lesser statutes, such as s. 365 of the Criminal Procedure Code.

[80] It follows that it is legally incorrect to state that the jurisdiction of the High Court to issue a writ of *habeas corpus* or release, stems from the fact of detention or the continued physical custody of the person. To maintain that a writ of *habeas corpus* only issues if continued physical custody is present, and that such continued physical custody can only exist where there is a current order of detention in existence is, with great respect, a flawed understanding of the law relating to unlawful detention and release, or the law of *habeas corpus*. The correct legal position is that the actual physical custody of the detainee under a subsisting detention order only, is not a pre-condition to the grant of the remedy of release under art. 5(2) FC. It is however generally necessary that the detainee seeking release is in detention at the time when the application for release or *habeas corpus* is sought *vide* an application to the High Court.

[81] The question that then follows is this: If the issuance of an order of release or *habeas corpus* is not predicated upon the fact of continuing physical custody of the detainee under a subsisting detention order only (as postulated by our courts in several decisions including *Nasharuddin Nasir, Sejahratul Dursina, Faizal Haris, Rajanderan* and *Arasa Kumaran*) but on art. 5(2) FC, can it then be categorically concluded that in the absence of actual physical detention under a subsisting order of detention, the remedy of release is barred or prohibited?

[82] Put another way, if a person who is unlawfully detained seeks to challenge his detention and applies under art. 5(2) FC for a writ of *habeas corpus* or release, and is then subsequently released or placed under some other form of detention (which appears *prima facie* to be valid), is his constitutional right to have the 'unlawful' detention removed, usurped or truncated? Is the constitutionally guaranteed process extinguished, if the applicant for *habeas corpus* is discharged by the relevant authority after the application for *habeas corpus* has been filed and submitted for the court's consideration?

[83] The answer is obviously no, if art. 5(2) FC is given full and substantive effect.

[84] If indeed the remedy afforded art. 5(2) FC is refused on the basis that the detention order pursuant to which the application was made, has been replaced with some other detention order, or that the detainee has since been discharged, the scheme of Part II of the FC, more particularly art. 5(2) FC, would be frustrated, as a person could be detained for a length of time unlawfully, and released just prior to the hearing of his application for *habeas corpus*, notwithstanding that he filed it during the period that he was detained, as explained earlier on.

[85] The failure to give full effect or even consider art. 5(2) FC fully, is evident, with the greatest of respect, in the cases of *Nasharuddin Nasir, Faizal Haris, Rajanderan* and *Arasa Kumaran*. In point of fact these cases effectively abrogate this constitutional right enshrined in art. 5(2) FC.

[86] We have made reference at the outset of this judgment relating to the academic issue, that the High Court is bound to perform its constitutional duty of review under art. 5(2) FC, by considering the legality of the detention at the point of filing of the application for release. It is a point worth reiterating here, because it provides alternative and substantive legal reasoning to support the conclusion that the substitution of another order of detention under s. 4(2) POCA as well as s. 19A POCA cannot deprive the detainee of his entitlement to have his review heard on its merits.

[87] The full and proper construction to be afforded to art. 5(2) FC is that the court looks at the application as if it were a s. 4(1) POCA detention, and if such detention is tainted, then it follows that any other detention ensuing from it, must be similarly tainted, because they both stem from the same series of transactions under the same legislation, namely POCA. The fact that the initial remand and detention was tainted, cannot be ignored or swept under the carpet, allowing for continued detention under separate but related provisions of POCA.

[88] This is evident from a perusal and construction of POCA in its entirety, where it may be noted that it comprises a series of mandatory or imperative provisions which have to be complied with prior to proceeding on to the subsequent bases for such preventive detention. The sections are all predicated on each other, such that it is not possible to read each section as comprising a complete and entire basis for the initial or continued detention of the detainees.

[89] In short, POCA is not legislation providing for a series of truncated detentions. Each segment of the detention under POCA is related to the former. The net consequence is that any subsequent action taken to place the detainee under a new or separate form of detention, or even to release the

A detainee, does not undermine or stultify the court's express duty to scrutinise the earlier detention with a view to satisfy itself that such earlier detention is indeed legal and valid under the relevant preventive detention laws.

[90] To that end, the relevant question to be asked therefore, is whether the applicant was in detention at the point of time when the application was filed.

B

[91] That is the purport of the decision in *Zaidi Kanapiah*, as explained and reaffirmed above. Reliance in that case was placed on *Ezam*, where the thrust or heart of Abdul Malek Ahmad FCJ's legal reasoning was that the issue of whether or not the detention is unlawful remains a live issue even at the appellate level, because the judge had undertaken a review of the same in the

C High Court. The Federal Court was therefore entitled to examine the High Court decision, at which point in time the detainees or most of them were still in physical detention.

[92] Turning back to *Goh*, with respect, it is evident that the court there

D failed to give effect to art. 5(2) FC as it failed to examine the issue of the legality of the detention under s. 4(1)(a) on the grounds that such detention had 'expired'. Such a construction results in the fundamental purpose and object of art. 5(2) FC being stultified and rendered nugatory. An unintended delay in the hearing of a *habeas corpus* application would then determine the

E fate of the detainee, notwithstanding his constitutional rights entrenched in art. 5(2) FC. In *Goh*, this court sought to reject *Ezam* and re-assert the legal position in *Faizal Haris*, *Rajanderan* and *Arasa Kumaran* as representing the correct legal position, despite the clear rejection of the same as no longer being good law in *Zaidi Kanapiah*, a decision of the same court handed down a month prior to *Goh*.

F

Faizal Haris

[93] Given the heavy reliance on the case of *Faizal Haris* in *Goh*, a consideration of that decision is necessary. *Faizal Haris* was relied on to support the conclusion that the fact that the detainee is detained under

G another provision of the same preventive detention legislation, renders the application 'academic', because the relevant period under the first detention has expired.

[94] *Faizal Haris* is authority for the proposition that any application for *habeas corpus* can only, and must only be made in respect of a current and

H subsisting detention order, and no other. This means in effect that an application for *habeas corpus* can only be considered or allowed by a court where there is a subsisting detention order and the detainee is currently within the physical custody of the relevant authority under the subsisting detention order.

I

[95] In *Faizal Haris*, Augustine Paul FCJ sought to resolve the legal question of whether irregularities in a prior detention order vitiate a subsequent regular detention order issued by way of preventive detention. The preventive detention legislation in that case was the Dangerous Drugs (Special Preventive Measures) Act 1985 ("DDSPMA"). There, the initial arrest and detention was fraught with irregularities. This was accepted, and Augustine Paul FCJ stated as follows:

> … This raises the question of whether the irregularities vitiate the subsequent regular detention order issued by the Minister.

That was the primary issue in the case. The judge then went to state that it is:

> … only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention … The corollary is that a detention order can be made against a person under s. 6(1) even when his detention under s. 3(2) was irregular.

[96] In arriving at this conclusion, Augustine Paul FCJ relied, *inter alia*, on the textbook by RJ Sharpe entitled *The Law of Habeas Corpus*, 2nd edn, more particularly the excerpt at pp. 180 to 181 of the book. It is necessary to read the passage in Sharpe with care. This is because the entire passage in the textbook relied upon in *Faizal Haris*, deals with the application for *habeas corpus* in the context of an arrest preceding ordinary criminal proceedings, where there is a formal charge preferred against the accused, which is to be followed by a full and fair trial. It does not contemplate, nor make any reference to preventive detention where there is no such opportunity afforded to a detainee, save as provided for in the legislation.

[97] The point to be appreciated is that in the context of an arrest and detention as envisaged in Sharpe's textbook, the detainee, in effect the accused, who was illegally arrested, is detained pending a full criminal trial, where he is at liberty to present his defence, and is entitled to an open trial with all the necessary safeguards of the criminal justice system at the detainee's or accused's behest. Not so in the present set of appeals, nor those in *Zaidi Kanapiah* or *Goh*, where the relevant legislation is preventive legislation and where there is no prospect of an open criminal trial at all.

[98] In the former circumstance, namely the context in the passage from Sharpe relied upon in *Faizal Haris*, the arrest can be clinically or surgically excised, as it were, from the rest of the trial, because the detainee or accused person proceeds with a full trial. Whereas the detainee detained under preventive detention legislation is not afforded such an opportunity. In such a circumstance, is it correct to seek to "surgically" excise the arrest and detention under s. 3 which is fundamentally flawed, from the subsequent

order of detention made by the Minister under s. 6 DDSMPA, the same Act? Does the said legislation envisage such clinical excision, leaving the detainee shorn of such limited safeguards as subsist in the legislation?

[99] A reading of the express provisions of the said legislation answers the question in the negative. The issue in *Faizal Haris* was whether the irregularities in s. 3(2) DDMSPA could affect the issuance of the detention order by the Minister under s. 6 DDMSPA.

[100] Section 3(1) and 3(2) of the DDMSPA expressly prescribe how and in what circumstances a person may be arrested without a warrant and detained. The proviso to s. 3(2) sets out the various statutory safeguards that subsist to ensure that the right of any police officer to arrest and detain without a warrant is not abused. Definitive stages of the detention require the supervision and scrutiny of a senior police officer of escalating seniority as the period of detention increases.

[101] Section 3(3) then specifies that the police officer making an investigation "pertaining to a person arrested and detained under this section" shall cause a copy of the complete report of the investigation to be submitted, *inter alia*, to the Minister. It is therefore clear that the report of the police officer making the investigation pertains to a person who has been arrested and detained in accordance with the earlier provisions, namely s. 3(1) and 3(2). In other words, it is envisaged in the DDSMPA that the person arrested and detained must be so detained in accordance with the modes of arrest and detention specified in s. 3(1) and (2). This report goes to the Minister, who is then able to ascertain whether, in point of fact, the arrest for preventive detention is in accordance with the Act.

[102] And s. 6 DDSMPA provides that the subjective satisfaction of the Minister is only arrived at after considering, *inter alia*, a complete report of investigation submitted under sub-s. (3) of s. 3. In other words, the s. 3(3) report which relates back to the mode of arrest and detention as prescribed in s. 3(1) and (2) is relevant and significant material that the Minister is statutorily bound to consider before deciding whether he is satisfied that a detention order should ensue.

[103] If it is said that the statutory requirements as set out in s. 3(1) and 3(2) DDSMPA can be surgically excised from s. 6, it would mean that the Minister would have to ignore all deficiencies in the report submitted under s. 3(3), which report comprises an essential part of the basis for his subjective satisfaction. And the report in s. 3(3) DDSMPA is inextricably linked to s. 3(1) and (2) DDSMPA.

[104] However, Augustine Paul FCJ held on the contrary, that the detention order issued by the Minister under s. 6 DDSMPA was disparate and could be completely excised from the arrest and detention effected under s. 3(1) and

(2) DDSMPA. In other words, the various sections in the DDSMPA were to be read disjunctively and disparately, as if each section is in its own silo. Accordingly, it was in order for deficiencies in the arrest procedure to be ignored, as that could not 'taint' or affect the issuance of the detention order by the Minister pursuant to s. 6 DDSMPA. This, with the greatest of respect, does not allow for a harmonious interpretation of the law.

[105] Further, in so holding, the learned judge was importing the law generally applied in relation to ordinary criminal proceedings, namely that the illegality of an arrest in relation to the accused, will not taint the criminal trial which ensues. That is indeed tenable where the accused is constitutionally entitled to a full and fair trial under art. 5(1) FC. But can that same line of legal reasoning apply to preventive detention legislation where the mode and manner of arrest is an integral part of the entire process leading up to a lengthy period of detention with no trial? Again the answer must be no.

[106] The learned judge, by so reasoning and concluding committed, with the greatest of respect, a fundamental error in equating:

(i) the irrelevance of irregularities of arrests in the course of ordinary criminal proceedings; with

(ii) irregularities or non-compliance with statutorily prescribed arrest and detention procedures under the DDSMPA, which is preventive detention legislation.

[107] Such statutory prescriptions in relation to arrest and detention, subsist to ensure that there is no abuse of the preventive detention law. As such, these provisions do, in fact, amount to the equivalent of a condition precedent in a statute requiring the validity and integrity of an arrest to be attained, prior to issuance of the formal order of detention under the statute.

[108] Preventive detention law in itself eliminates most of the safeguards available to persons prosecuted under the general criminal justice system. Such safeguards that do subsist are expressly provided for in the relevant legislation itself, art. 149 FC as well as art. 151 FC. If even these statutorily prescribed safeguards are removed, persons so detained will be deprived of even the most basic protection in defending themselves against such preventive detention legislation.

[109] These issues were, with the greatest of respect, not considered in *Goh* notwithstanding that the issue there was whether *Ezam* or *Faizal Haris* was correct in its legal reasoning. The excerpt from Sharpe and its application to substantiate the excision of s. 3 from s. 6 so as to preserve and protect the detention order issued by the Minister was, with respect, not analysed.

A **The Scope And Ambit Of The Remedy Of Release Or *Habeas Corpus* Under Art. 5(2) FC**

[110] Further on in the judgment of *Faizal Haris*, Augustine Paul FCJ then went on to state:

B > ... The general rule that a writ of *habeas corpus* must be directed against the current order of detention therefore applies where the detention under s. 6(1) has been made subsequent to an arrest and detention under s. 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of *habeas corpus* must be directed only against that order even if the earlier arrest and detention is irregular. This view is
C > supported by *Barnado v. Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the
D > custody of another.

[111] The legal proposition made here is that an application for *habeas corpus* can only be directed against a presently subsisting order of detention, such that once an order under s. 6 DDSMPA is pronounced, any application for release or *habeas corpus* from detention by reason of deficiencies or non-
E compliance under s. 3(1) and (2) DDSMPA, stand extinguished. The entitlement of a complainant to have the legality of his detention under those provisions examined by the courts is lost. This in effect means that a detaining authority is at liberty to halt the detention under a particular provision and issue a further order under a different provision of the same
F legislation to avoid any scrutiny of the deficiencies or irregularities in the earlier detention.

[112] Such a legal stance is at odds with the rationale that has been put forward earlier on in *Ezam*, *Zaidi Kanapiah* and this judgment. As stated earlier on in this judgment, in every *habeas corpus* application challenging
G detention, the inquiry by the court focuses on the application as of the date of filing of the same. As long as the person was in detention at that point in time, the inquiry may proceed. But in *Faizal Haris* that entitlement is effectively removed. For the reasons set out earlier this is not a tenable proposition.

H **[113]** The rationale for this legal proposition in *Faizal Haris* was stated to be founded on the case of *Barnado v. Ford*. Reliance was placed on a statement of Lord Halsbury in so concluding. However, a full reading of the case discloses that what Lord Halsbury was disapproving of, was the use of the writ of *habeas corpus* to punish a person who had previously wrongfully
I detained, but was not, at the point of issuance of the application for *habeas corpus*, detaining him. Instead, he stressed that the remedy was primarily, if

not solely to obtain the production of the person who was wrongfully detained. No element of punishment ought to be introduced into the remedy. And Lord Halsbury made this statement because the Court of Appeal in another case at the time had made the proposition that it was possible to issue the writ to punish the person who had wrongfully detained a person.

[114] In allowing for the writ to issue Lord Halsbury stated *inter alia*, as follows:

> … I cannot acquiesce in the view that some of the learned judges below seem to have entertained, that if a Court is satisfied that *illegal detention has ceased before application for the writ has been made,* nevertheless the writ might issue *in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another* … I think under such circumstances, the writ ought not to issue at all, *as it is not the appropriate procedure for punishing such on conduct.* (emphasis added)

[115] Here it is evident that reference was being made to release from an unlawful or illegal detention prior to, or before the writ of *habeas corpus* has even been applied for. In other words, the person was not in the detention of the person against whom the remedy is sought, at the point in time when the application was made.

[116] This accords entirely with what has been stated previously in this judgment and in *Zaidi Kanapiah*. In *Zaidi Kanapiah* it was stated that the application for *habeas corpus* must be viewed as of the date of the filing of the application for release under art. 5(2) FC or *habeas corpus*. That means the date when the application for release was made. So, as long as the person is in the detention of a particular authority at the time when the application was made, the application may be heard and the writ issued. The remedy is generally not available when the person was not even in the detention of the person or authority against whom the remedy is sought, as of the date of the application for the writ.

[117] In the case of *Faizal Haris*, and the present series of appeals, when the applications for *habeas corpus* were made or filed, the appellants were all under detention which they claimed to be unlawful. By the time the applications were heard, their detentions were under different sections of the same preventive detention, for example s. 6 DDSMPA rather than s. 3 DDSMPA in *Faizal Haris*, and similarly in these appeals under POCA. Therefore, on an application of Lord Halsbury's statement, it is apparent that the detainees in *Faizal Haris* and the present appeals were all still in detention under the same preventive legislation at the point in time when the applications for *habeas corpus* were made. They were not free from detention at the point in time when the applications were made, as envisaged by Lord Halsbury in *Barnado v. Ford*.

[118] In short, the fact of physical custody and detention at the point of the hearing of the application is not a necessity in order for a court to grant the remedy. As stated earlier, the practice is that often where the detainee is in point of fact free from any form of detention, the application is withdrawn. However, where detention changes from one part of restraining authority to another it can hardly be said that the person is no longer in preventive detention anymore. To that extent the distinction made in *Faizal Haris* is, with the greatest of respect, artificial and is not borne out by either the passages in Sharpe nor the case of *Barnado v. Ford*.

[119] The proposition that physical custody and subsisting detention is the basis for the jurisdiction of the court to issue *habeas corpus* is incorrect. As pointed out above, the position in this jurisdiction is governed by art. 5(2) FC. However, even in the United Kingdom, the writ of *habeas corpus* allows for the issuance of the writ even where the detaining authority may not be able to immediately deliver up custody of the person.

[120] This is borne out by the English case of *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48 where the Supreme Court of the United Kingdom considered the issue of control in *habeas corpus* and held, *inter alia*, as follows:

> Control
>
> 45. At the heart of the cases on control in *habeas corpus* proceedings lies the notion that the person to whom the writ is directed has either actual control of the custody of the applicant or at least the reasonable prospect of being able to exert control over his custody or to secure his production to the court. Thus in *Barnardo v. Ford* [1892] AC 326 where the respondent to the writ had consistently claimed to have handed the child, who was the subject of the application, over to someone whom he was no longer able to contact, *the courts nevertheless ordered that the writ should issue because they entertained a doubt as to whether he had indeed relinquished custody of the child. There was therefore a reasonable prospect that the respondent, despite his claims, either had or could obtain custody of the child.*
>
> 46. And in *R v. Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361, Bankes LJ, *although he accepted the affidavit evidence of the Home Secretary to the effect that Mr O'Brien was under the control of the governor of Mountjoy prison and that the governor was an official of the Irish Free State not subject to the orders or directions of the Home Secretary or the British government, nevertheless decided that the writ of habeas corpus should issue.* This was because the arrangements which existed between the Irish Free State and the United Kingdom provided grounds for believing that the Home Secretary could obtain the return of Mr O'Brien. Mr O'Brien had been arrested in London under regulation 14B of the Restoration of Order in Ireland Regulations 1920 and deported to Ireland there to be interned until further order. A

statement had been made in the House of Commons on 19 March 1923 that the Irish Free State had given the British government a number of undertakings, one of which was to the effect that if it was decided that any person should not have been deported he would be released. *On this basis, the Court of Appeal in effect held that there was a reasonable prospect that the Home Secretary could exert sufficient control over the custody of Mr O'Brien to justify the issue of the writ. Scrutton and Atkin LJJ agreed with Bankes LJ, Atkin LJ observing that the question was whether control "exists in fact". The circumstance that Mr O'Brien was under the control of the governor of the prison was "by no means inconsistent with an agreement with the Free State Government to return on request". Although he acknowledged that there was doubt as to whether the Home Secretary could exert control, Atkin LJ held that there was material before the court which suggested that he could, and, on that account, habeas corpus should be granted.* (Of course, the Court of Appeal's apprehension that the Home Secretary did have sufficient control to secure the production of Mr O'Brien proved to be entirely correct for he was brought to the court on 16 May 1923 and was "thereupon discharged").

47. On appeal to the House of Lords, (*Secretary of State for Home Affairs v. O'Brien* [1923] AC 603), the Home Secretary's appeal was dismissed on jurisdictional grounds. Lord Atkinson dissented on that issue but he clearly approved the Court of Appeal's analysis for, in a passage at p 624, which has resonances for the present appeal, he said this:

> *(The writ of habeas corpus) operates with coercive force upon the Home Secretary to compel him to produce in Court the body of the respondent. If the Executive of the Free State adhere to the arrangement made with him he can with its aid discharge the obligation thus placed upon him …*
> (emphasis added)

[121] It is evident from a reading of the series of cases starting from *Barnado v. Ford, R v. Secretary of State for Home Affairs, Ex p O'Brien* [1923] 2 KB 361 and *Rahmatullah* that control over the person of the detainee or the ability to exert control to produce the person in court is an important or essential requirement for the grant of the writ of *habeas corpus*. It does not require actual physical custody or detention to actually subsist, as is suggested in *Faizal Hari*s. In *Faizal Haris* the legal rule laid down is that there must be current and subsisting physical detention of the detainee to enable a writ of *habeas corpus* be issued. In *Nasharuddin Nasir* that concept was taken further to state that the issuance of the writ depended upon the physical fact of detention as the court derived its jurisdiction from such detention. With the greatest of respect, these conclusions are difficult to defend as being correct.

[122] It is reiterated that the situation is entirely different in relation to the situation in *Faizal Haris* and the series of appeals here, where the relevant law is preventive detention and *de facto* physical custody had simply been passed on to another related detaining authority under the same preventive detention legislation, to whom and with whom the detaining authority summoned, had full access. To therefore conclude that *Barnado v. Ford* is to be read as

somehow limiting or restricting the effect of art. 5(2) FC, simply because detention and control had passed from one arm of the detaining authority to another, and that therefore no *habeas corpus* could issue is, with the greatest of respect not an entirely correct reading of the said authority.

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653; [2018] Supp MLJ 393 ("Rajanderan")

[123] In *Goh*, this court then sought to rely on *Rajanderan* which mirrored and adopted the approach in *Faizal Haris*, refusing to depart from the same. The same emphasis on the requirement of a subsisting physical detention to warrant the grant of *habeas corpus* plus the treatment of different sections within the same piece of legislation as comprising disparate detentions was adopted. For the reasons we have outlined at length above, the decision in *Rajanderan* therefore retains the same flaws in coherent legal reasoning as *Faizal Haris.*

[124] The construction given to art. 5(2) FC and the remedy of *habeas corpus* as enunciated in *Ezam* and affirmed in *Zaidi Kanapiah* is therefore the correct approach to adopt. The legal reasoning in *Faizal Haris*, *Rajanderan* and *Arasa Kumaran* as well as *Nasharuddin Nasir* and a series of other cases that adopt this reasoning is, with respect, less than accurate for the reasons set out above. It is for this reason that we stated in our brief grounds that *Zaidi Kanapiah* overrules the approach in *Faizal Haris* and the series of cases emanating therefrom. The analysis here addresses the concerns raised about the accuracy of the reasoning in *Zaidi Kanapiah* conclusively by pointing out the flaws/errors in the approach adopted in *Faizal Haris* and thereby *Goh*. *Goh* did not, with the greatest of respect, undertake any independent analysis but adopted *Faizal Haris* on the basis that the reasoning there and in *Nasharuddin Nasir* and *Sejahratul Dursina* are correct and *Ezam* is wrong. For the reasons we have articulated here, the approach in *Goh* is therefore fraught with similar infirmities.

[125] At para. 101 of *Goh*, the majority decision goes on to stipulate that as the only remedy in an application for a writ of *habeas corpus* is release of the detainee from the detention, if the detainee is no longer under detention the writ of *habeas corpus* ought not to issue. We have addressed this issue at length earlier on to point out that if such an approach is adopted then the remedy afforded under art. 5(2) FC will be rendered nugatory. That is why the application is determined on the basis of the date on which it is filed. So long as the detainee is under detention when the application for *habeas corpus* is filed, the remedy is available even if detention has changed from detention under one section of the legislation to another simply because the entirety of these provisions are interconnected and interlinked, comprising a series of steps taken to culminate in the detention order which preventively detains the detainee for some considerable length of time. That is why the term one overarching transaction is utilised.

[126] In *Goh*, it was sought to explain and make further inferences from the orders of this court in *Ezam*. The concern over the fact that the order released the appellants despite the fact that one had been released is, with respect, unwarranted because the application is dealt with as of the date of the filing of the application for *habeas corpus*. And this in turn is because the jurisdiction of the court does not originate from the fact of physical custody and detention *per se*, but from art. 5(2) FC. Therefore the criticism against the decision that the issue of the grant of *habeas corpus* was not academic is unjustified, and not correct.

[127] Similarly as we have explained above the legal reasoning in *Nasharuddin Nasir* suffers from the same infirmity as *Faizal Haris*, as the ability to issue a writ of *habeas corpus* is stated to be entirely dependent on the fact of continuing physical detention against the detaining authority at the point in time when the application is heard, rather than when it is filed. Further the court went on to hold that the very jurisdiction of the court is premised on this fact of continued physical detention. It is reiterated that this is flawed for the reasons explained at length earlier, namely that the relevant time at which a court is to consider the issuance of a writ of *habeas corpus* is that point in time when the writ is applied for, and the detainee is then in detention. Secondly the jurisdiction of the court to issue the writ of *habeas corpus* derives not from the fact of physical detention, but from art. 5(2) FC, in this jurisdiction. The former premise is predicated on the old English writ of *habeas corpus* stemming from the English common law as it was, at the onset of the remedy. Therefore the case does not represent a correct reflection of the law in this jurisdiction.

[128] When a detention which is the subject matter of challenge is considered in this context, it follows that as the focus is on the duty of the court to inquire into the legality of the detention the fact that the *de facto* custody and detention of the applicant has passed on to a different gaoler or detaining authority, but under the same preventive detention legislation or even other detention, that cannot in itself prohibit the constitutional review from being undertaken by the court. That is why *Zaidi Kanapiah* referred to the several stages of detention under different sections of the same legislation as amounting to one overarching transaction. And this is amply supported by *Ezam* as well as *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 which represent the more legally coherent legal proposition.

[129] The majority decision in *Goh* also sought to fault the reasoning in *Zaidi Kanapiah* (and thereby in this decision) in relation to its holding that the relevant and earliest date for the purposes of ascertaining whether a detention is lawful, warranting the grant of an order of release, is the date of filing of the case. In *Goh*, an attempt was made to reject the reasoning in *Kanyu*. Reliance was placed on *Sejahratul Dursina* where it was held that: "there

should not, or could not, be a separation of the date of hearing from the date of the decision. The date fixed for decision forms part of the hearing; the hearing of an application certainly includes the decision thereof."

[130] Taking this line of reasoning one step further, there should not, nor could not be a separation from the date of application, ie, the date of the filing of the application for release under art. 5(2) FC and the date of the hearing or the date of the decision. This would be anomalous. The three are inextricably intertwined and therefore the correct date for consideration should be at the point when the application is made. This is consistent with the reasoning in *Barnado v. Ford* and most other authorities, save for *Faizal Haris, Nasharuddin Nasir, Sejahratul Dursina* and the line of cases that followed, and continue to adopt the reasoning there. Again an adoption of any date other than the date of application will result in the entire exercise under art. 5(2) FC being rendered nugatory in the event the detention ceases, or is transferred. The issue of art. 5(2) FC being rendered nugatory has not been satisfactorily considered nor answered in any of those cases, including *Goh*.

[131] For the reasons stated above, it is reiterated that the decisions in *Ezam*, *Theresa Lim* and *Zaidi Kanapiah* reflect the correct legal reasoning in law. As such the legal reasoning in *Goh, Faizal Haris, Rajanderan, Nasharuddin Nasir, Sejahratul Dursina* and the case law following those cases is flawed, and ought not to be followed.

[132] For the reasons we have set out above, we concluded that the applications for *habeas corpus* sought in both sets of appeals are not academic.

Summary On The 'Academic' Point

[133] For clarity, we state again that the 'academic' point argued in these appeals actually encompassed two separate situations.

[134] The first situation was premised on the argument that the initial preventive detentions upon which the applications for *habeas corpus* were premised had become academic by reason of the fact that they were superseded by subsequent preventive detention orders, effectively abrogating the High Court's constitutional duty under art. 5(2) FC.

[135] The second situation was the specific allegation that the preventive detentions had become academic by virtue of the fact that the detainees concerned had, after filing their applications for *habeas corpus*, been released.

[136] We rejected these arguments and in so doing, reaffirmed *Zaidi Kanapiah* as representing the correct view on the subject. Without narrowing what has been reasoned at length above, we summarise our legal findings as follows:

(i) the High Court's constitutional duty to assess the legality of any detention – especially preventive detention – starts from the date of filing of the *habeas corpus* application assuming that the detainee was, at the time he filed it, under detention. In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(ii) the jurisdiction of the High Court or a High Court Judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for *habeas corpus*;

(iii) viewed in this way and giving art. 5(2) FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention;

(iv) similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(v) finally the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'. The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court Judge.

[137] More specifically in relation to the set of six appeals, the fact that the detention was one under s. 19A POCA rather than s. 4(1)(a) POCA did not render the applications academic as at the date of the filing of the application the six applicants were indeed detained under s. 4(1)(a) POCA. Moreover, the application specifically seeks release from detention under the provisions of ss. 3, 4 and any other provisions of POCA. That in itself warrants the court inquiring into the matter in view of its mandatory constitutional duty of review under art. 5(2) FC. The judge failed in his duty and erred in law when he failed to undertake the review and make a decision on this point, holding that it was academic.

[138] With respect to the 19 applicants in the second set of appeals, again the fact that they are now free from detention under POCA, the relevant period of detention of six months having expired, in no way precludes them from challenging the decision of the High Court on the issue. As explained at length above, the issue remains 'live' on appeal.

[139] We therefore went on to hear the appeals on their merits.

A **Issue 2: Does Online Gambling *Simpliciter* Fall Within The Ambit Of POCA And Art. 149 FC?**

[140] All the appellants in these two sets of appeals were detained for the reason that they were concerned with the organisation and management of online gambling, which the respondents maintain, fall within the purview of
B item 5 of the First Schedule to POCA.

[141] In the High Court the appellants in the second set of 19 appeals (as the first set of six appeals was disposed of on the preliminary point) maintained that online gambling *simpliciter* does not fall within the purview of POCA.

C **[142]** More specifically the submission was that POCA only refers to limb (1)(a) of art. 149 FC and therefore does not encompass limb (1)(f) of art. 149 FC. As such, any application of POCA is restricted to limb (1)(a) of art. 149 FC which deals primarily with causing, or causing a substantial number of citizens to fear 'organised violence against persons or property'. It was
D submitted that the management and organisation of online gambling *simpliciter* does not fall within this limb, particularly as there is no factual allegation or basis to support the requirement of organised violence against persons or property.

[143] The High Court Judge dismissed this contention holding *inter alia* that:

E
(i) a purposive reading of POCA as a whole, including the object and intent of that Act, meant that its overall objective was to prevent any action as described in art. 149(1)(a) to (f) FC. In short the High Court read the entirety of art. 149 FC as being incorporated in POCA by reason of its preamble and short title;

F
(ii) accordingly, the High Court Judge went on to contemplate only whether online gambling *simpliciter* fell within the purview of art. 149(1)(f), namely whether it was "prejudicial to public order in, or the security of, the Federation or any part thereof"; and

G (iii) the High Court Judge further relied on the judgment of the majority in *Zaidi Kanapiah* on this point to conclude that he was bound by *stare decisis* to hold that online gambling *simpliciter* fell within the purview of limb (1)(a) of art. 149 FC.

[144] As stated at the outset, we held in the instant appeals that online
H gambling *simpliciter* does not fall within the purview of limb (1)(a) of art. 149 FC. The two primary issues that fall for consideration in this context are:

(i) On a statutory construction of POCA, is the statute effectively restricted to limb (1)(a) of art. 149 FC, or does it include and encompass limbs (1)(a) to (f) inclusive of art. 149 FC?

I

(ii) As is evident from our oral decision, we concluded that POCA is restricted to limb (1)(a) and does not incorporate nor encompass the other limbs, namely (b) to (f) of art. 149 FC; and

(iii) Does online gambling *simpliciter* fall within the purview of art. 149(1)(a) and POCA, warranting its inclusion in item 5 to the First Schedule to POCA?

Issue (a): On A Statutory Construction Of POCA, Is The Statute Effectively Restricted To Limb (1)(a) Of Art. 149 FC, Or Does It Include And Encompass Limbs (1)(a) To (f) Inclusive Of Art. 149 FC?

[145] It is necessary to commence with a consideration of the relevant provisions of the FC as well as the POCA.

[146] Article 149 FC falls within Part XI of the FC which in turn is entitled "Special Powers Against Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers".

[147] Article 149 FC itself is entitled "Legislation against subversion, action prejudicial to public order, etc" and provides:

> 149(1) If an Act of Parliament recites that *action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:*
>
> (a) *To cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or*
>
> (b) ...; or
>
> (c) ...; or
>
> (d) ...; or
>
> (e) ...; or
>
> (f) *which is prejudicial to public order in, or the security of, the Federation or any part thereof,* any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.
>
> (emphasis added)

[148] The title to POCA reads as follows:

> An Act to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[149] The recital to POCA reads as follows:

A WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia **to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;**

AND WHEREAS Parliament considers it necessary to stop such action;

B NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows (emphasis added)

[150] The question that falls for construction is whether POCA when read in the context of art. 149 FC is specifically focused on limb (1)(a) of art. 149 C FC or incorporates all six limbs from (1)(a) to (f).

[151] A perusal and construction of art. 149(1) FC reveals that the provision is made in the FC for special powers accorded to Parliament to legislate against subversion, organised violence and acts and crimes which are prejudicial to the public as well as emergency powers, which may well be D inconsistent with some of the fundamental liberties safeguarded in arts. 5, 9, 10 and 13 of the FC. It is therefore a special power that allows for, *inter alia*, the preventive detention of persons, but in circumstances as specifically provided for in the situations set out in art. 149(1) FC. It cannot be gainsaid that the very manner of provision of these special powers makes it clear that E these powers are to be utilised sparingly and solely within the specified context of the FC and not otherwise.

[152] This brings to the fore the role of the High Courts and this court when dealing with such cases of preventive detention. It is evident from art. 5(2) FC that the role of the High Court is one of constitutional importance, as it F involves undertaking a vigilant and careful consideration of the legality of the detention of an individual who has been deprived of his liberty without the benefit of a fair trial. Liberty is the highest form of freedom, and preventive detention, while necessary, forfeits this freedom under specific conditions. This is recognised under the FC that systematically sets out by way of an G exceptional provision the special powers and the circumstances in which such powers are to be utilised.

[153] Therefore, when a complaint of unlawful detention, which it is alleged does not conform to the specific provisions set out in art. 149 FC and its legislation is enacted pursuant to art. 149 FC, it is incumbent upon the courts H to undertake a vigilant scrutiny of the basis for the detention to ensure it complies strictly with art. 149 FC.

[154] As stated in *Vijay Narain Singh v. State of Bihar* (1984) 3 SCC 14, a decision of the Supreme Court of India, Venkataramiah J speaking for a majority of two out of a three-member bench stated: I

> 32. … It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law …

[155] In *Union of India v. Yumnam Anand* (2007) 10 SCC 190 another decision of the Supreme Court of India, the principles relating to preventive detention were explained comprehensively and warrant repetition here:

> 8. In the case of preventive detention no offence is proved nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. …
>
> But at the same time, a person's greatest of human freedoms i.e. personal liberty is deprived, and therefore, the laws of preventive detention are strictly construed and a meticulous compliance with the procedural safeguard, however technical, is mandatory. The compulsions of the primordial need to maintain order in society without which enjoyment of all rights including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of individual liberty. (see *Ayya v. State of U.P.* (1989) 1 SCC 374: 1989 SCC (Cri) 153: AIR 1989 SC 364]). To lose our country by a scrupulous adherence to the written law, said Thomas Jefferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No *carte blanche* is given to any organ of the State to be the sole arbiter in such matters.

[156] Article 149 FC which permits preventive detention, and legislation enacting such preventive detention therefore comprises an exception to art. 5(1) FC. As an exception to the fundamental liberties enshrined in Part II FC, it cannot arbitrarily be utilised to annul the right to liberty in art. 5(1) FC. That right, comprising a part of a person's right to fundamental liberties, is to be accorded full effect, by ensuring that such persons are not arbitrarily detained by way of incarceration for long periods, without any prospects of a trial. Again, this underscores the need for the High Court and this court to adopt a vigilant scrutiny of the legality of the suspension, and ensure that it conforms and falls within the ambit of these special laws.

[157] As stated in *R v. Secretary of State for the Home Department ex p Stafford* (1998) 1 WLR 503 (CA), a decision of the Court of Appeal in the United Kingdom:

> … The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.

[158] POCA is one such piece of legislation. A reading of the recital to POCA makes it clear that it refers solely to the criterion set out in limb (1)(a), namely to "cause, or to cause a substantial number of citizens in the country to fear, organised violence against persons or property; …".

[159] It makes no reference to limbs (b) to (f) of art. 149 FC, each limb of which is particularly crafted to deal with specific situations, namely creating disaffection against the Yang di-Pertuan Agong or any Government in the Federation – limb (b); or to promote feelings of ill-will and hostility between races – limb (c); or to procure the alteration by unlawful means of anything established by law – limb (d); action which is prejudicial to the maintenance or the functioning of any supply of service to the public – limb (e); or action which is prejudicial to public order in, or the security of the Federation – limb (f). It is evident that each limb deals with a different and separate form of, or situation of 'emergency'.

[160] Each of these limbs is separated within art. 149 FC by the use of the word 'or' expressly. Such use of the word 'or' warrants a construction that each limb is to be read disjunctively. This in turn means that each limb is to be read as being applicable to disparate situations of emergency. In practical terms, it means that if it is intended to promulgate legislation pursuant to art. 149 FC to deal with an emergency encompassing more than one situation envisaged under the various limbs of art. 149 FC, then it is necessary to specifically and expressly invoke the particular emergencies a particular piece of legislation is envisaged to contain or suppress.

[161] The High Court Judge held that the reference to art. 149 FC in the paragraph immediately prior to the short recital, as shown below:

> AND WHEREAS Parliament considers it necessary to stop such action;
>
> NOW, THEREFORE, **pursuant to Article 149 of the Federal Constitution** IT IS ENACTED by the Parliament of Malaysia as follows: (emphasis added)

was sufficient to incorporate all the separate and specific limbs of art. 149 FC.

[162] The learned judge, with respect, erred in so concluding as he failed to give any consideration to the matters referred to above in relation to statutory interpretation. He also failed to consider the use of the word 'such action' in the first limb above as bold. That denotes the fact that the legislation in issue, namely POCA was enacted to stop 'such action'. 'Such action' in turn refers to the first paragraph of the long recital, namely:

> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia **to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property.** (emphasis added)

[163] That in turn means that POCA is promulgated pursuant to art. 149 FC specifically to stop action which causes or causes a substantial number of citizens to fear organised violence against persons or property. Not any of the other limbs in art. 149 FC. Therefore it is erroneous to seek to extend the scope and ambit of POCA to encompass all six limbs of art. 149 FC when it is specifically promulgated to stop the particular emergency situation stipulated in art. 149(1)(a) FC.

[164] Finally a consideration of the preamble to POCA bears out and lends supported to the limited reading espoused above.

> An Act to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[165] It is directed at limb (a) as the control of criminals, members of secret societies, terrorists, etc are all linked to organised violence. And that is fortified, as specified earlier, by the recital.

[166] The High Court Judge also stated that the preamble and long recital which comprise a part of POCA, as well as its contents are to be read purposively and with a view to give effect to the object of the Act. That is, with respect, correct. However the need to read all statutes purposively (see s. 17A of the Interpretation Acts 1948 and 1967) does not and cannot detract from the role of the Judiciary to give effect to what is expressly enacted and not to extend the use of the legislation where it has been specifically stipulated to be utilised for the purposes of limb (a) only. It is not permissible to extend the express usage of the legislation, particularly in relation to legislation which is specifically stated to be promulgated under special powers, which abrogate express freedoms guaranteed under Part II FC.

[167] More importantly perhaps, the High Court Judge applied an erroneous and unwarranted method of statutory interpretation to POCA which is enacted pursuant to the restrictive and special emergency provisions set out in art. 149 FC. This is the long-accepted principle that any such emergency powers which restrict the fundamental liberties are to be read narrowly, rigidly and strictly. The rationale for reading such preventive detention restrictively has been set out above. It warrants reiteration that such detention is an anathema to civilised thought and democracy, that safeguards are built into art. 149 FC in itself as safeguards to ensure that the limits are clearly circumscribed and are not abused. It is the function of the Judiciary

to ensure that these limits are strictly complied with. And that is achieved in art. 149 FC by the safeguards legislated in limbs (a) to (f) which mean that when legislation is promulgated by Parliament under this article, it has to be specifically directed at a particular form of emergency that has to be stopped. A proper reading of POCA read in conjunction with art. 149 FC, reveals that it does not permit a lax, careless or cumulative approach to be taken to preventive detention, such that any act seen to be prejudicial may be fitted into any one or more of the specific categories outlined in art. 149 FC.

[168] As a consequence of taking such an unwontedly liberal and cumulative approach to POCA and art. 149 FC, the High Court Judge then went on to consider whether online gambling *simpliciter* was prejudicial to public order under art. 149(1)(f) FC. As such his approach thereafter in these appeals is flawed, as his primary focus was whether such activity caused 'public disorder' rather than whether such activity comprised activity which caused or caused a substantial number of citizens to fear organised violence against persons or property. Moreover in determining that online gambling caused public disorder, the High Court Judge, with great respect, made general speculative conclusions which were entirely devoid of any form of *prima facie* evidence. Certainly there was nothing in the 'pengataan fakta' or 'statement of facts' which warranted any such conclusion.

[169] Having concluded that online gambling caused public disorder, the High Court Judge relied on the majority decision in *Zaidi Kanapiah* in relation to whether online gambling fell within the purview of POCA. In that case, the facts are identical to the present case. The contention before the court was that the Minister had acted outside the scope of his authority in categorising online gambling *simpliciter* as being registrable under POCA. As this was *ultra vires* the Act, declarations and *habeas corpus* were sought. Additionally it was submitted that online gambling *simpliciter* did not fall within the purview of 'organised violence' as envisaged in art. 149(1)(a) FC. The singular difference between *Zaidi Kanapiah* and the present case is that there, the appellants sought to have POCA declared unconstitutional for failure to recite the entirety of art. 149 FC, whereas in the instant case the appellants seek declarations that online gambling *simpliciter* does not fall within the purview of POCA or art. 149(1)(a) FC.

[170] In the majority decision on this issue in *Zaidi Kanapiah*, this court considered specifically whether the allegations made against the appellants there, which are in substance similar to those made against the appellants here, came within the scope of the POCA because online gambling *simpliciter* is not a crime of 'organised violence'.

[171] At the root of this issue is whether online gambling *simpliciter* falls within POCA because POCA is promulgated pursuant to art. 149(1)(a) FC for the purpose of stopping activities of 'organised violence' as expressly stated there.

Zaidi Kanapiah – The Majority Decision Holding That "Online Gambling *Simplicifier*" Fell Within POCA

[172] Two of the five-member coram delivered the majority reasoning relating to this issue. It will be recalled that three judges held that online gambling fell within the purview of POCA, while two judges held that it does not fall within the purview of POCA, although the majority held that POCA was not, in itself, unconstitutional.

[173] In *Zaidi Kanapiah*, the judgments of the majority of the coram delivered by Justice Vernon Ong Lam Kiat FCJ and Justice Hasnah Mohammed Hashim FCJ held, *inter alia*, as follows:

Justice Vernon Ong's rationale:

(i) in order to answer the question of whether online gambling *simpliciter* amounts to 'organised violence against persons or property', the legislative history of POCA and its predecessor legislation needs to be considered, including the Hansard in relation to the inclusion of gambling syndicates in the list of registrable offences;

(ii) in Hansard, the then Minister of Interior and Justice made reference to the POCA Bill as being designed to deal with '… secret society members, gangsters, thugs, extortioners, opium dealers, pimps and keepers of brothels and gambling dens' and the need to protect society and prevent these associations developing into a serious menace. This was amended in 2014 to its present form;

(iii) after considering the dictionary meaning of 'organised' and 'violence' it was concluded that 'organised violence against persons or property' ought to be juxtaposed with the meaning of the word 'unlawful gaming'. As 'unlawful gaming' is not defined in POCA, reliance was then placed on William Blackstone's reflections on the policy perspectives and practices "of his class on gaming". A history of gaming and its evils was considered and a nexus made, premised on various academic papers, between online gambling *simpliciter* and organised violence; and

(iv) on this basis it was concluded that the association of illegal gaming activities with organised violence is irrefutable. There was concurrence with the majority judgment.

A **The Majority Judgment In Relation To 'Unlawful Gambling' In *Zaidi Kanapiah* By Justice Hasnah Mohammed Hashim FCJ**

(i) the issue was whether 'unlawful gaming' in para. 5 of Part 1 of the First Schedule of POCA falls beyond the ambit of 'organised violence against persons or property'; (The principal argument sought a declaration that
B POCA itself was unconstitutional and this was one of the direct issues in relation to the preventive detention of the appellants there. Issue (i) here was a sub-issue within the principal argument. It is different in the instant case where the argument is solely related to whether online gambling *simpliciter* falls outside the ambit of POCA and whether, the
C Minister therefore acted outside the scope of his authority accorded to him under, or *ultra vires* POCA). We have addressed this issue earlier;

(ii) the amendment of POCA to include "All persons concerned in the organisation and promotion of unlawful gaming" contained in para. 5 of Part I of the First Schedule could not be ignored because it has been in
D existence since POCA was promulgated in 1959 when POCA became a preventive law laid down in Parliament at the time. The history of the section was considered, namely that the provision against gambling initially related to "All persons habitually concerned in the organisation and promotion of unlawful gaming" up to its amendment in 2014 to its
E present form;

(iii) the intent of POCA was to be gleaned from its long title – to prevent crime and for the control of criminals, members of secret societies, terrorists and other undesirable persons and matters incidental thereto. The Common Gambling Houses Act was then considered. It was not
F included within POCA because it comprised legalised activity; and

(iv) the meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of POCA. Significantly this court held that those words must not be interpreted restrictively as submitted by the appellants in that case.
G

Our Decision And Analysis On This Point

[174] Prior to the delivery of decision, we gave consideration to both the majority and minority decisions in *Zaidi Kanapiah*, and determined that the minority decision delivered by the Chief Justice, with respect, reflects the
H correct approach to be adopted when determining whether online gambling *simpliciter* falls within the purview of para. 5 of Part I of the First Schedule to POCA. We concluded that online gambling *simpliciter* does not fall within the purview or ambit of POCA as there is no nexus between the online gambling and organised violence as envisaged under POCA.

I

[175] The surmise or postulate that it "must" be linked or "may" be linked to organised violence is entirely speculative and cannot reasonably form the basis, whether factually or legally, to endorse online gambling *simpliciter* as comprising an activity that is predicated on, or has led to organised violence. From a factual viewpoint, as stated earlier, there is nothing whatsoever in the statement of allegations to warrant such a conclusion.

[176] Legally, ie, from the viewpoint of statutory interpretation, the position is even more clear. Online gambling and organised violence are two separate and disparate matters. It is not tenable to construe the two separate matters as being interrelated without any form of factual basis, even *prima facie*, to support any such finding.

[177] 'Online gambling', while not specifically defined in the legal dictionaries, envisages a gambling service accessed remotely ie, online, through the internet where the participants gamble by depositing funds and playing games of chance, like sports betting, online poker, etc.

[178] 'Organised violence' envisages the commission of acts of violence which cause significant pain to persons by an organised group, often a member of a crime syndicate. It may also encompass the issuance of threats of violence or intimidation or coercion.

[179] It is immediately apparent that on an objective assessment of these two separate activities, there is no immediate nexus or link between them *per se*. Save perhaps for the possibility of both being "organised" in nature. However, that in itself is insufficient to warrant an inference that where there is online gambling *simpliciter*, there must follow, as a matter of course, organised violence. And *vice versa*, namely that where there is organised violence organised gaming must or does, subsist. It is the existence of a *prima facie* factual basis that warrants combining the two, or concluding that both elements subsist. It is only where both elements subsist, ie, 'gambling online' and 'organised violence' that the matter falls for qualification under POCA.

[180] The fact that illegal gaming may in some, or even many instances result in violence, does not warrant the conclusion, reasonably or coherently, that online gambling *simpliciter* must include organised violence *per se*. Such an interpretation, with respect, does violence to the purpose and intent of POCA and fails to comply with the express and narrow provision set out in art. 149(1)(a) FC.

[181] As explained at the outset and as expressly stipulated in the minority judgment of the Chief Justice:

(i) the inclusion of the art. 149 FC recitals in emergency laws such as POCA "serves as a constitutional safeguard ensuring that any such law is properly enacted for the purposes envisaged by that article";

(ii) constitutional provisions that limit or derogate from the fundamental liberties in Part II FC must be read restrictively (see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301 at para. 13);

(iii) as stated in *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29; [2021] 1 MLJ 601 ("*Selva Vinayagam*") by Vernon Ong Lam Kiat FCJ:

> [34] … Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore strict compliance with the letter of the rule of law is the essence of the matter.

(iv) the role of the Judiciary in interpreting the law does not mean that reliance is placed excessively or solely on Hansard or the stated purpose of the Bill when it was introduced. Parliament's intention must be drawn from an objective assessment of the words utilised in the legislation and not from statements by the promoters of the Act, as explained fully in *Zaidi Kanapiah* by the Chief Justice. Most importantly statutory construction particularly constitutional is a matter falling within the purview of the Judiciary.

(v) as stated at the outset in relation to the approach to be adopted in interpreting restrictive laws in relation to liberty of the person, it is important to adopt a restrictive approach which ensures that the fundamental liberty enshrined in art. 5(1) FC is not trampled upon without adequate basis. It must be borne in mind that art. 149 FC and hence POCA which permits preventive detention is an exception to art. 5(1) FC. This is expressly recognised in the FC itself. To that end, while art. 149 FC permits such legislation in the specific circumstances prescribed there, it must be borne in mind that it is indeed an exception that cannot be utilised to override art. 5(1) FC without sufficient basis. In this aspect we are unable to concur with the reasoning of the majority in *Zaidi Kanapiah* on this aspect of the decision, namely that in construing legislation restrictive of fundamental liberties, like POCA and other preventive detention, the approach to be taken is a liberal and broad approach, without regard to technicalities. The reverse is in point of fact, true. When a person is preventively detained it is the preventive legislation itself, ie, POCA, art. 149 FC and art. 5(1) FC which are attracted. And in construing whether a particular act, series of acts or omissions fall within the purview of POCA or art. 149(1) FC, it is the duty of the courts to ensure that the facts and circumstances brought before it directly and imminently leads to harm, danger or alarm amongst the citizens of the nation or the general public at large.

Conclusion On Whether Online Gambling *Simpliciter* Falls Within The Purview Of POCA

[182] Therefore, we are constrained to depart from, and overrule that part of the majority decision in *Zaidi Kanapiah* relating to whether online gambling *simpliciter* falls within the purview of POCA. We held and now reassert that in our judgment, online gambling *simpliciter* does not fall within the purview of para. 5, Part I, First Schedule of POCA.

Issue 3: Does POCA Apply To Citizens And Non-citizens?

[183] The primary contention put forward by the appellants in both sets of appeals is that POCA does not apply to non-citizens or non-nationals of Malaysia. The basis for this submission is premised on the difference between art. 151(1)(a) FC which utilises the word 'person' as compared to art. 151(1)(b) FC which makes reference specifically to 'citizen' only. Article 151(1) FC reads as follows:

> 151(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order **any person** is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) **no citizen** shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di Pertuan Agong may allow.
>
> (emphasis added)

[184] The primary argument before us was that in view of the distinction between the use of the word 'person' under art. 151(1)(a) FC and 'citizen' in art. 151(1)(b) FC the entirety of those provisions ought to be 'read down' as it were such that POCA was only applicable to citizens and not to non-nationals like the appellants. Otherwise, it would result in citizens being accorded the opportunity to make representations before an Advisory Board and be heard on the issue as to why they should not be so preventively detained, while non-nationals or non-citizens were deprived of that opportunity under art. 151(1)(b) FC. This it was argued ran awry of art. 8 FC which guarantees equality of treatment under the law to all persons, regardless of whether they are citizens or non-citizens.

A **Our Analysis**

[185] In essence we are of the view that the use of the words 'person' in art. 151(1)(a) FC and 'citizen' in art. 151(1)(b) FC is deliberate. A basic tenet of constitutional interpretation is that the various articles in the FC are to be construed harmoniously. To our minds, both provisions are capable of being
B harmoniously construed, and do not, when read together, contravene other constitutional provisions, in particular art. 8(1) FC. In this context, while legislation under art. 149 FC may contravene some of the fundamental liberties as enshrined in arts. 5, 9, 10 and 13 FC, it does not allow any derogation from arts. 4 and 8 FC. In other words, compliance with art. 8(1)
C FC is mandatory.

[186] Before us, it was argued that such a difference in treatment between citizens and non-citizens or non-nationals is discriminatory under art. 8(1) FC. However, a more focused consideration warrants the conclusion that the difference in the use of the terms 'person' and 'citizen' in the two provisions
D respectively does not amount to unlawful discrimination under art. 8(1) FC.

[187] Article 8(1) FC does not require all persons in all circumstances to be treated alike. Reasonable classification is permitted if it is based on intelligible differentia and shows a nexus between the basis of classification and the object, sought to be achieved by the statute in issue. As held by
E Abdoolcadeer FCJ in *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116:

> The general basic principle culled from the authorities and judicially determined, succinctly put is that art. 8(1) FC permits reasonable classification founded on intelligible differentia, having a rational relation
F or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[188] In the instant appeals we concluded that art. 8(1) FC was not contravened because the test above is met. This in turn is because the classification between citizens and non-citizens is a reasonable classification
G as the differential between them is distinct, discernible and rational. The purpose of art. 151(1)(a) FC is to accord with the fundamental principles of natural justice by ensuring that any person, citizen or non-citizen, detained under legislation promulgated under art. 149 FC, is informed of the grounds for his detention and accorded an opportunity to make representations in
H respect of such detention.

[189] Article 151(1)(b) FC affords an added or further constitutional safeguard in the form of a hearing before an Advisory Board which does not appear to be mandatory for non-citizens, as the term used in this paragraph is 'citizen' and not 'person'. It therefore appears that this further safeguard
I is not available to non-citizens.

[190] We pointed out above that there is an intelligible difference between citizens and non-citizens. Does that intelligible difference between a 'citizen' and a 'person' have a rational nexus with the policy and object of Part XI FC? A

[191] The answer is in the affirmative as the primary function of Part XI FC is to accord special powers to Parliament to enact singular legislation specifically against subversion, organised violence, crimes prejudicial to the public and emergency powers. It is in view of the extreme nature of these acts and events which have potentially deleterious and destructive effects against the security and interests of the nation that such special powers are accorded to Parliament. This extends to permitting the promulgation of legislation that is not compliant with arts. 5, 9, 10 and 13 FC. B C

[192] In these extreme circumstances, the rational and reasonable construction to be accorded to these differing modes of treatment is that the FC recognises and has accorded special powers to Parliament to legislate differently for non-citizens as compared to citizens in relation to matters of national security. The reason why there is a distinction between citizens and non-citizens is because the FC recognises that when it comes to national security, Parliament is entitled and therefore empowered to treat nationals and non-nationals in a different way. D

[193] It is reiterated that Part XI FC deals specifically with national security and how to deal with threats against such risk. The risk posed by citizens and non-nationals may well be dissimilar and diverse. Accordingly, the promulgation of legislation which treats the two categories of persons differently is premised on a rational basis, namely distinct and intelligible criteria, which meets the objective of art. 149 FC. As such there is no contravention of art. 8(1) FC. It might well have been different if preventive detention under POCA or legislation pursuant to art. 149 FC expressly provided that such detention without trial was only available against non-citizens as compared to citizens. It would have been difficult to justify compliance with art. 8(1) FC, given the clear preference accorded to citizens as opposed to non-citizens. It would also potentially contravene international standards. E F G

[194] We are aware that in the instant case we are dealing with art. 149 FC and that in dealing with the contention that it contravenes art. 8(1) FC, we are applying the test normally utilised for legislation enacted pursuant to the FC rather than the articles of the FC itself. Notwithstanding this, the issue at hand is the same, namely whether art. 8(1) FC has been contravened. The test therefore remains the same, namely whether there is a coherent basis for the differentiation premised on intelligible differentia which has a rational nexus to the policy or objective of the statute or the article in question. H I

[195] We, therefore, conclude that in view of the intelligible differentia between citizens and non-citizens or non-nationals more particularly in the context of the singular nature of art. 149 FC which deals with the special powers afforded to Parliament in relation to national security and emergency, the lack of provision of this further safeguard in art. 151(1)(b) FC does not offend art. 8(1) FC. This is particularly so as the fundamentals of natural justice are accorded due recognition and effect in art. 151(1)(a) FC.

[196] A reading of POCA itself discloses that there is nothing in that Act which discriminates against citizens and non-citizens as reference is made to 'person'. The function of the Prevention of Crime Board ("the Board") as stipulated in the Act makes it mandatory for all persons to appear before the Board prior to any period of preventive detention or release from detention being ordered by the Board. As such it cannot be said that the provisions of POCA run awry of art. 8(1) FC.

[197] Further, in the instant appeals, notwithstanding the lack of such a mandatory requirement under art. 151(1)(b) FC, all the appellants were afforded the opportunity to appear before the Advisory Board constituted under POCA and put forth their representations through counsel. As such they were, practically speaking, not deprived of the added safeguard afforded under art. 151(1)(b) FC. This too detracts against any possible contravention of art. 8(1) FC in these appeals.

[198] Finally, it should be noted that art. 149(1) FC envisages the promulgation of legislation, including preventive detention legislation, where a substantial body of "persons whether inside or outside the Federation" cause or threaten subversion, organised violence or crimes prejudicial to the public as well as in the event of an emergency. In promulgating such legislation therefore, Parliament is not constrained to restrict itself to citizens. It is open to Parliament to legislate against "persons" in general, which includes non-nationals or non-citizens, where they are involved in such acts which constitute a grave threat to national security in the manner specified in art. 149 FC. This is yet another reason why it would be legally incorrect to conclude that POCA only applies to citizens and not to non-citizens.

[199] For these reasons, we concluded that POCA applies to both citizens and non-citizens or foreign nationals.

[200] These are our reasons in full for allowing all the appeals in both categories of appeals comprising 25 in total, and order that the High Court ought to have ordered *habeas corpu*s in all these appeals at the material time.